Supreme Court, U.S.
FILED
JUL 10 1997
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(5)

No. 96-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

GEORGE G. ROGERS, PETITIONER,

v.

UNITED STATES, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 12, 1997
CERTIORARI GRANTED MAY 27, 1997

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RELEVANT DOCKET ENTRIES NOT INCLUDED

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Judgment of the United States District Court for the Southern District of Florida, dated June 7, 1994 . . . . 20a

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated September 17, 1996 . . . . . 1a

Order of the United States Court of Appeals for the Eleventh Circuit, entered January 6, 1997 . . . . . 18a

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

George G. Rogers, Appellant

v. No. 94-4692

United States, Appellee.

RELEVANT DOCKET ENTRIES

EVENT	DATE
Appeal docketed	July 5, 1994
Record on Appeal filed	April 28, 1995
Brief for Appellant filed	July 7, 1995
Brief for Appellee filed	August 10, 1995
Reply Brief for Appellant filed	September 27, 1995
Oral Argument held	March 29, 1996
Opinion issued	September 17, 1996
Petition for Rehearing En Banc filed	October 8, 1996
Petition for Rehearing denied	January 6, 1997

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

United States of America

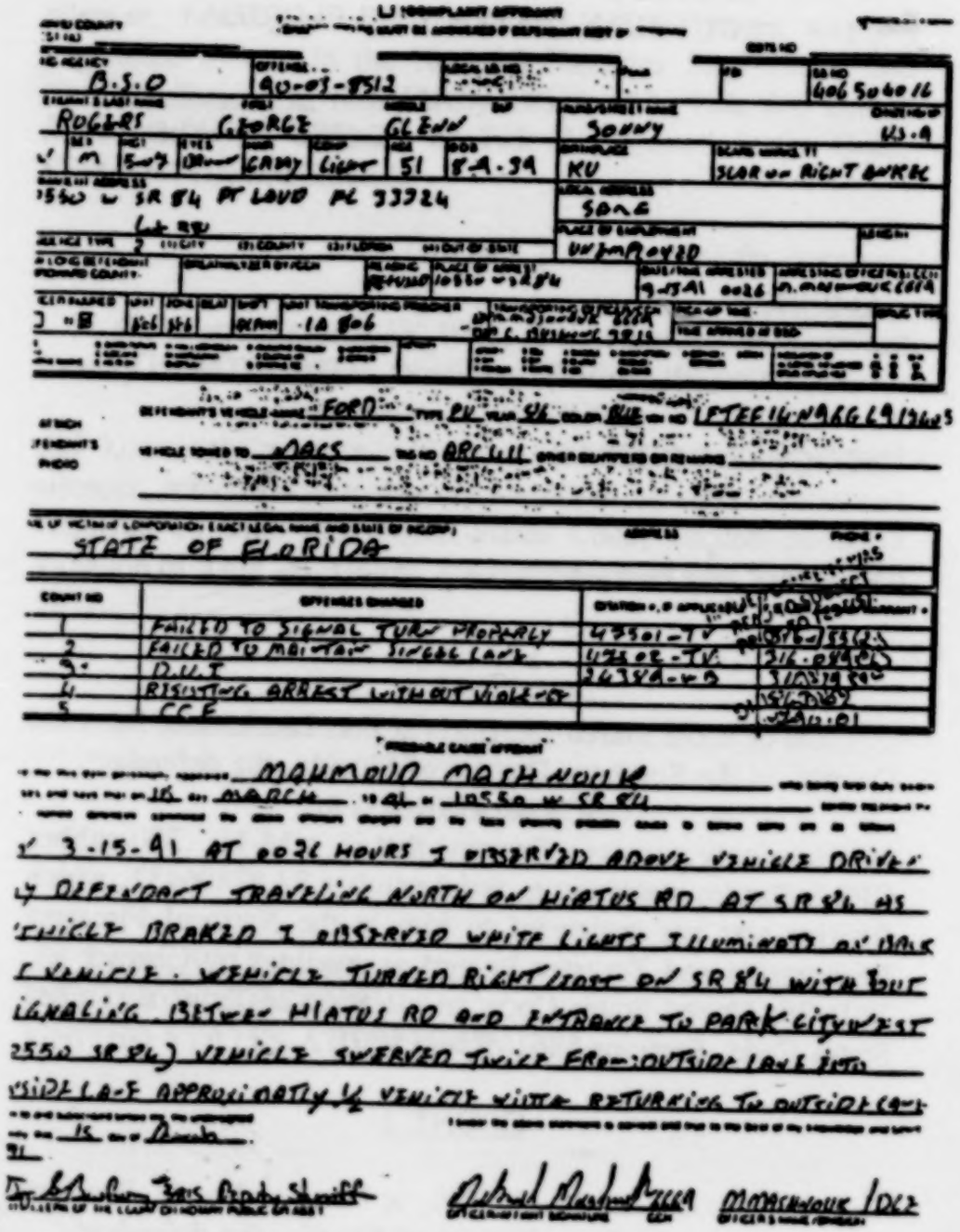
v. No. 91-6044 CR NCR

George G. Rogers, Defendant.

RELEVANT DOCKET ENTRIES

EVENT	NO.	DATE
Indictment filed	1	March 21, 1991
Arrest warrant issued	2	March 21, 1991
Arrest warrant executed	6	April 26, 1991
Superseding indictment filed	27	September 9, 1992
Defendant released on bond	55	December 17, 1993
Jury trial held	61	March 28-31, 1994
Court's instructions to the jury	62	March 30, 1994
Defendant's proposed non-pattern jury instructions	63	March 28, 1994
Guilty verdict entered	65	March 31, 1994

EVENT	NO.	DATE
Motion for new trial and for judgment of acquittal filed	67	April 8, 1994
Response to motion for new trial	68	May 2, 1994
Denial of motion for new trial	69	May 20, 1994
Sentencing hearing	72	June 2, 1994
Order sentencing defendant to imprisonment of time served, 3 years supervised release, and special assessment of $150.00	73	June 7, 1994
Notice of Appeal filed	75	June 8, 1994



B.S.O 90-03-8512 406 50 60 16
ROGERS GEORGE GLENN SONNY
M KU SLAR or RIGHT BURKE
5540 W SR 84 FT LAUD FL 33324 SAME
10 806
FORD PU 96 LFTEE16:NAGG69126
TOWED TO MACS ARC 111
STATE OF FLORIDA

COUNT NO	OFFENSES CHARGED	STATUTE & DEGREE
1	FAILED TO SIGNAL TURN PROPERLY	316.155(1)
2	FAILED TO MAINTAIN SINGLE LANE	316.089(1)
3	DUI	316.193
4	RESISTING ARREST WITHOUT VIOLENCE	843.02
5	CCF	893.13(6)

MAHMOUD MASHNOUK
16 MARCH 91 1550 W SR 84

3-15-91 AT 0026 HOURS I OBSERVED ABOVE VEHICLE DRIVEN BY DEFENDANT TRAVELING NORTH ON HIATUS RD AT SR 84. VEHICLE BRAKED I OBSERVED WHITE LIGHTS ILLUMINATE ON REAR OF VEHICLE. VEHICLE TURNED RIGHT (EAST ON SR 84 WITHOUT SIGNALING BETWEEN HIATUS RD AND ENTRANCE TO PARK CITY WEST (550 SR 84) VEHICLE SWERVED TWICE FROM OUTSIDE LANE INTO INSIDE LANE APPROXIMATELY ½ VEHICLE WIDTH RETURNING TO OUTSIDE LANE
16 March

Deputy Sheriff — Broward Sheriff's Office

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO._____
26 USC 5861(d)and 5871
26 USC 5861(i) and 5871

UNITED STATES OF AMERICA	)	
v.	)	INDICTMENT
GEORGE G. ROGERS	)	

The Grand Jury charges that:

COUNT 1

On or about March 15, 1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, the defendant,
GEORGE G. ROGERS,
did knowingly possess a firearm, that is, a M-11, .380 caliber RPB Industries machinegun, serial number SAP3806432, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 2

On or about March 15, 1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, the defendant,
GEORGE G. ROGERS,

did knowingly possess a firearm, that is, a 9" by 1 3/4" silencer, bearing no serial number, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 3

On or about March 15, 1991, at Fort Lauderdale, Broward County, in the Southern District of Florida, the defendant,
GEORGE G. ROGERS,
did knowingly possess a firearm, that is, a 9" by 1 3/4" silencer, which firearm was not identified by serial number as required by Title 26, United States Code, Section 5842; in violation of Title 26, United States Code, Sections 5861(i) and 5871.

A TRUE BILL

_____
FOREPERSON

/s/ Dexter W. Lehtinen
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO._____

UNITED STATES OF AMERICA	)	
	)	
v.	)	ESTIMATED TRIAL TIME
	)	
GEORGE G. ROGERS	)	

CERTIFICATE OF TRIAL ATTORNEY

I do hereby certify:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the indictment/ information.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28, U.S.C., Section 3161.

3. This cause will take 0-5 days for the parties to try.

4. (Check the appropriate category)

_X_ I 0 to 5 days

____ II 6 to 10 days

____ III 11 to 20 days

____ IV 21 to 60 days

____ V 61 days and over

5. Has this case been previously filed in this Court? NO If Yes, Judge _____, Case Number _____

6. Was this matter pending in the Office of the United States Attorney as of August 16, 1985?

_____	_X_
Yes	No

/s/ Lynn D. Rosenthal
LYNN D. ROSENTHAL
ASSISTANT UNITED STATES
ATTORNEY

Defendants Requested Jury Inst #1 91-6044-CR-NCR
USA v. Rogers

Mere proximity to an illegal firearm, standing alone, is insufficient to find the Defendant guilty of possession of illegal firearms.

US v Gates, 491 F.2d 720 (7th Cir. 1974)

RECEIVED & FILED IN OPEN COURT
ON 3/28/94 AT
Ft. Lauderdale, FLA.
T. G. Cheleotis, Clerk
United States District Court
Southern District of Florida

_____ Approved

__✓__ Denied

_____ Modified

Defendants Requested Jury Instruction #2

A person who is not in actual possession, but who knowingly has both the power and the intention to later take control over something, is in constructive possession of it.

US v Daniels, 527 F.2d 1147 (6th Cir. 1975)

_____ Granted

__✓__ Denied

_____ Modified

Defendants Requested Jury Instruction #3

To establish "knowing possession" of a firearm, the Government must prove beyond a reasonable doubt that the defendant willfully and consciously possessed items which he knew to be "firearms."

US v Parker, 566 F.2d 1304 (5th Cir. 1978)

US v Freed, 91 S. Ct. 1112 (1971)

J. Blackmun
8th Cir.

_____ Granted

__✓__ Denied

_____ Modified

OPENING JURY INSTRUCTIONS

[Tr. 78] THE COURT: Let me go over a few things with you before we begin. You may be wondering what qualifications you have to be a juror. Some of you have not been jurors before and let me assure you that you are admirably qualified to be a juror because of something you have been in training for all of your lives.

I say that because the major task of a juror is to determine credibility, believability of the witnesses. You have been training for it all of your lives because even little babies make credibility choices. They don't jump into the arms of strangers but they tend to crawl to parents or grandparents. And you have been doing this all the way along. You evaluate everybody you meet, everybody you talk with every day.

We have a number of colloquialisms we use and they all describe credibility. Some people we size them up. And some people we take what they say with a grain of salt. Others, his word is his bond. Still others, I wouldn't believe him if he was standing on a stack of bibles. You've probably used all those phrases. They all deal with credibility, believability. And that's the major function of [Tr. 79] the jury I think and that's why the jury system works so well.

You are particularly good at evaluating credibility, who's telling the truth, the whole truth and nothing but the truth and who's not. So it's the same whether it's a criminal case or an auto accident, intersectional collision, who had the red light and who didn't. You'll be able to figure it out.

And the same is true in any kind of a trial. Now, breach of contract cases try your patience a little more. A mal is sometimes a little more interesting but they usually do settle out on stuff like that. Now you have seen a lot of movies on television, in the movie theatre and they bare [sic] some resemblance to reality. The one way that they definitely bare [sic] a resemblance to reality is that the lawyers will be asking

questions of the witnesses and occasionally the lawyer from the other side will object. What does that mean?

It raises a question of law which is my department and I have to rule on it. If someone asks a question and there is an objection and I either sustain the objection or overrule it. If I overrule the objection the witness may answer the question and you may consider both the question and the answer. If I sustain the objection the witness is not supposed to answer and you should disregard the question. But if they answer and I sustain the objection, ignore both the question and the answer.

[Tr. 80] Let me state it for you another way.

Nothing a lawyer says in a courtroom is evidence, absolutely nothing, accept a question when it's coupled with an answer. That becomes evidence and you may consider it.

If you have a question and an objection and I overrule the objection, the witness may answer and you may consider it.

If there is a question and an objection and I sustain the objection, ignore the question, it's just lawyer talk.

If there is a question and an objection and I sustain it and I'm too slow in ruling or the witness has blurted out an answer and sometimes they don't know to stop, if I sustain the objection, but the witness has already answered the question, ignore both the question and the answer if I sustain the objection.

Now the case will proceed in the following manner. The first thing which will happen here this afternoon the lawyers make an opening statement. That's kind of like a preview of coming attractions. It's been likened to the picture on top of a jigsaw puzzle box. And that may be the best analogy because evidence comes to you in bits and pieces and the picture will give you an idea of what the evidence will look like when all the pieces of evidence have been presented.

[Tr. 81] Now what the lawyers say is not evidence.

The government goes first and then the defendant. And the government goes first in everything just about because the government has the burden of proof beyond a reasonable doubt.

The opening statements are not evidence. And when we recess today there won't have been any evidence in the case when you go home tonight. Tomorrow morning we'll get to the reception of evidence and the government here again goes first.

Then tomorrow or whenever after the government rests, the defendant may present evidence; but a defendant does not have to do so. After that, if the government has any rebuttal evidence after the defendant rests, then the government may present rebuttal evidence if there has been any evidence presented by the defendant.

When the parties all rest then we come to closing arguments by the lawyers and then I shall instruct you on the law that is applicable to this case. Not until then can you discuss the case among yourselves. I will give you plenty of warning whenever we get to that point.

There is one instruction that I think is important enough that I need to go over with you now as well as later and let me briefly touch on that at this point.

The indictment or formal charge against a defendant [Tr. 82] is not evidence of any kind. Indeed the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all; and if a defendant elects not to testify you should not consider that in any way during your deliberations.

The government has the burden of proving a defendant guilty beyond a reasonable doubt and if it fails to do so you must acquit the defendant. Thus, while the government's burden of proof is a strict or heavy one, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is required that the government's proof exclude any reasonable doubt concerning defendant's guilt.

A reasonable doubt is a real doubt based upon reason and common sense after a careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely on it, act upon it without hesitation in the most important of your own affairs. If you are convinced the defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so. You will, of course, say so in the verdict you render at the end of the case.

Now you've seen us at sidebars over here already. What we are doing there is going over questions of law or matters of scheduling and that's my department. You are being [Tr. 83] deliberately being excluded; whenever I push that awful little noisemaker down you know you are being left out and that's so we don't have to send you out of the courtroom. At the end of the case we shall be left out. There won't be anybody in the jury room but you and that's because you are the judges of the facts.

Now I want you to look around the courtroom, folks. There are no cameras in here.

You're not going to see yourself on the evening news.

This is not CNN or the kind of trial that they would be interested in like the William Kennedy Smith trial. I guess they covered the one in Gainesville and the one up in Providence or New Bedford or whatever it was. There was one recently. I'm sure they would have covered Kathy Willetts if she had gone to trial. However, it is not that kind of case and federal court doesn't have cameras in the courtroom.

There is a camera up there but it is for specialized use where a defendant in a criminal case is unable to be present and that way they can monitor the proceedings even though they are not in the courtroom. And that's only been used one time in the years since this building has been built.

Now I need to tell you one more thing. My court reporter is over here and he takes down everything that happens here on

his stenotype machine. The problem is it is [Tr. 84] not for use of the jury. It is only for the use of the Court of Appeals if the case would ever get that far. And some day you will go back there with, you will have a VCR machine in your jury room and you'll have the VCR tapes or VHS or whatever and play it back if you want to hear whatever witness "A" said about "X" or "Y" or "Z". If you have a dispute as to what occurred or what was said in the trial you're going to have to resolve it by the use of your collective memory.

It will be very nice when they have things on VCR and you can play it back and resolve those conflicts. But we don't have that advantage now. So you'll have to be alert, attentive and use your collective memory. Don't feel terribly put upon. Jurors have been doing that for at least ten centuries and you can, too.

So, with that, let's see if we can have opening statements by the lawyers.

* * * *

EXCERPTS OF OPENING STATEMENT OF DEFENDANT

[Tr. 92] MR. SALANTRIE: Did the government take any fingerprints? We have to wait and see. Did they provide you any evidence of that? Certainly clear, concise and conclusive evidence could have been established one way or the other but that was not done.

I submit, ladies and gentlemen, that as a result of [Tr. 93] the government's inability to establish the most important element of this whole case, knowledge, actual knowledge, and as a result of their failure -- BSO agents actually -- failure to obtain any conclusive evidence of knowledge, to wit: actual fingerprints, that there exists a doubt, a reasonable doubt as to that element. And if there exists a reasonable doubt you must say so, find Mr. Rogers not guilty.

* * * *

SIDEBAR COLLOQUY

[Tr. 102] MR. SALANTRIE: Judge, as I mentioned in my opening, very simply, there's no knowledge. His position is he did not know, did not know how they got there.

* * * *

CROSS-EXAMINATION OF MAHMOUD MASHNOUK

* * * *

[Tr. 153] BY MR. SALANTRIE: Now you testified briefly regarding your observations of [Tr. 154] the truck that Mr. Rogers was driving prior to you pulling it over, correct?
A Yes, sir.
Q And at some point in time you turned on your siren.
A Yes, sir.
Q And Mr. Rogers pulled into his carport?
A Yes, sir.
Q And his vehicle was parked completely on his property, right, in the driveway, in the carport?
A In the driveway, yes, sir.
Q It was legally parked, right?
A In a slanted way, yes, sir.
Q But on his own property.
A Yes, sir.
Q You can park any way you want on your own property.
A Absolutely.
Q You pulled behind him, correct?
A Yes, sir. On an angle.
Q Now you testified that you made certain observations regarding a suspected DUI, right?

A Yes, sir.
Q Would it be fair to say that you became a Broward Sheriff's deputy approximately one month prior to the arrest of Mr. Rogers?
A Yes, sir.
[Tr. 155] Q It would be also an accurate statement that Mr. Rogers was your first ever DUI arrest.
A That I made myself, yes, sir.
Q And that would be the first time that you administered roadside sobriety tests to an actual arrestee.
A I think so, yes, sir.
Q And you testified that you administered some roadside tests, alphabet, touch the nose, toe-to-toe, right?
A Yes, sir.
Q Without going into any detail about those, wouldn't it be an accurate statement that your opinion that he failed the test is just your opinion, it's a subjective opinion on your part?
A Yes and no. I was with a field training officer who was a very experienced deputy.
Q I'm going to ask you what your opinion was.
A My opinion was that he was intoxicated.
Q Right. And that's your subjective opinion based upon your observations, right?
A Yes, sir.
Q Would it be a fair statement that you observed slurred speech?
A Yes, sir.
Q Would that be very slurred or slightly slurred?
A Right now I don't remember how. I mean it was slurred.
[Tr. 156] Q You don't remember.
A No, sir.
Q And did you observe an odor of alcohol?
A Yes, sir.
Q Did you observe bloodshot eyes?
A Yes, sir.

Q And as a result of that you arrested Mr. Rogers for DUI.
A Plus the traffic patterns of his driving.
Q He had some traffic tickets, right?
A Yes, sir.
Q And you arrested him for DUI.
A Yes, sir.
Q And he was charged and tried on that DUI charge, right?
A Yes, sir.
Q You testified at that trial?
A Yes, sir.
Q And the jury found him not guilty of DUI, correct?
A Yes, sir.
Q And that was a jury trial, right?
A Yes, sir.
Q And after your arrest on the DUI you conducted a search as you explained, right?
A Yes, sir.
Q And you located the one small .22 caliber in the front right --
[Tr. 157] A Left pocket, sir.
Q -- left pocket and you observed the other .380 under the hat, right?
A Yes, sir, on the seat next to him.
Q They're not automatic weapons?
A No, sir, they're not.
Q And in and of themselves a citizen can possess those weapons legally, correct?
A Yes, sir. There is some speculation who can in regard to felony charges, but, yeah, anybody can possess them.
Q Generally a citizen can possess those.
A Yes, sir.
Q And as a result of your finding those two guns you additionally charged Mr. Rogers with carrying a concealed firearm as to those two guns, correct?
A Yes, sir.

Q The Baretta and the .22 caliber Freedom Arms, right?
A Yes, sir.
Q And you also charged him with resisting arrest.
A Without violence.
Q By stepping back?
A By saying, "No way," and pushing back.
Q He didn't push you, though, did he?
A He just broke loose of me.
Q He stepped back.
[Tr. 158] A Yes, sir.
Q And as a result of that you immediately jumped on him and arrested him, right, handcuffed him?
A Yes, sir.
Q You never made any effort to explain to him why he was being placed under arrest, did you?
A Yes, sir, I did. I advised him he was being placed under arrest for DUI.
Q And didn't he, in fact, say, "Hold on just a minute"?
A He said something, "No way," or something like that.
Q It wasn't, "Hold on just a minute"?
A I don't believe so. I think he said, "No way."
Q You're not sure about that?
A No, sir. I believe it was, "no way."
Q Anyway, he was charged additionally with resisting without violence which is a misdemeanor, right?
A Yes, sir.
Q And two counts of carrying concealed firearm.
A Yes, sir.
Q And there was a trial.
A Yes, sir.
Q And there was a jury trial, correct?
MR. BARDFELD: I object, Your Honor. Relevance.
THE COURT: Sustained.
[Tr. 159] BY MR. SALANTRIE:
Q He was in fact acquitted of those charges, though, right?

MR. BARDFELD: Objection. Relevance.

THE COURT: It's repetitive. Sustained.

MR. BARDFELD: May we approach, Your Honor, sidebar?

THE COURT: I don't see any reason to.

MR. SALANTRIE: Judge, we had an agreement.

THE COURT: Very well. I'm not privy to everything, folks. I have to find out now.

MR. SALANTRIE: We can advise you very briefly.

THE COURT: Very well.

[Proceedings at sidebar:]

MR. BARDFELD: Your Honor, before this trial began we were talking about relevance, about certain items of evidence including the state court charges. I told Mr. Salantrie the government would be willing to stipulate that there was an acquittal for the DUI and things like that, but I just don't -- and we are still willing to stipulate to it but I don't think he should be able to go and ask this witness, you know, what happened in the state court action. I will stipulate that he was tried in the state court and he was [Tr. 160] acquitted.

MR. SALANTRIE: I will just ask him the one question then and be done with it, if I could do that.

THE COURT: Very well.

I can't compel anybody to accept a stipulation, an offer of stipulation, but I have some trouble about the relevance of the thing. Anyway, go ahead if you've got one question.

Let's go.

[Proceedings in open court:]

BY MR. SALANTRIE:

Q Deputy, let me just ask you one question.

A Yes, sir.

Q You charged Mr. Rogers with DUI, resisting arrest and two counts of concealed firearm, right?

A Yes, sir.

Q And he was found not guilty by a jury of all those counts, correct?

A Yes, sir.

* * * *

DIRECT EXAMINATION OF RICHARD CRAZE

* * * *

[Tr. 176] BY MR. BARDFELD: Q Now directing your attention to Government's Exhibit No. 5. What is Government's Exhibit No. 5?

A Government's Exhibit No. 5 is a firearms silencer, a particular type of firearms silencer called a Sionics-type, Sionics being a manufacturer of firearms silencers in the early '70s. This is a copy of one of those. It is devoid of the manufacturer's marks of identification, does not have a serial number and it is comprised of two outer cylinder sections, a ported sleeve, eyelets packed around the sleeve, a threaded bushing, a baffle, spirals and a component known as an encapsulator and then a front end cap assembly.

Q Does Government's Exhibit No. 5 fit onto Government's Exhibit No. 2?

A Yes, it does. It threads onto the barrel.

Q How does a silencer actually work?

A When a firearm is discharged a silencer, once it's attached to the firearm, will allow the projectile or the bullet to pass through the device but at the same time it will trap the very rapidly expanding burning gunpowder, and that's the noise that we associate with the gun being fired when it's fired. The loud bang that you hear is the very rapidly expanding gases as they enter into the atmosphere from the barrel. If you provide a means to trap that or slowly retard [Tr. 177] the release of that then you will lessen the noise that the firearm will make.

Q Do silencers completely silence a firearm?
A No, they do not.
Q Why don't they?
A Because there's a number of noises generated when a firearm is fired. There's mechanical noises, there's noise produced by the air being pushed forward by the projectile. All of these are overshadowed by the loud bang that we hear. It's similar to an automobile with a muffler on and a muffler off or defective muffler.
Q Did you have the opportunity to examine Government's Exhibit No. 5?
A Yes.
Q And how did you conduct your examination of Government's Exhibit No. 5?
A Again, a physical examination to identify its componentry and then subsequent test firing of the silencer with and without the silencer being attached to the firearm.
Q How many silencers have you examined or tested?
A I would estimate over two thousand.
Q What were the results of your tests in this particular instance?
A May I refer to a copy of my report?
THE COURT: Please proceed.
[Tr. 178] THE WITNESS: Government's Exhibit 2 was test fired five times without Government's Exhibit 5 attached. Each one of those sound levels were recorded and then an average taken.
BY MR. BARDFELD:
Q Okay. So in other words, you test-fired the machinegun without the silencer?
A That's correct. That was tested first. And that averaged 153.7 decibels. And then Government's Exhibit 5 was attached, the weapon fired five more times. Each time that sound level was recorded and then an average taken. With the silencer

attached it registered 132 decibels giving you a decibel reduction of 21.7 decibels.
Q Is that a significant reduction in sound?
A It's very significant.
Q Can you explain the extent of the significance or the difference?
A It's nearly a hundred percent of the effective sound.
When we are talking about sound reduction we are talking a logarithmic progression or digression.
So if we start with a known figure, reduce the decibels -- reduce the sound levels from 10 decibels, you've reduced the intensity 10 times; 20 decibels a hundred times; 30 decibels a thousand times. So it's very significant.
Q In this particular case you examined Government's Exhibit No. 5. Can you identify Government's Exhibit No. 5, [Tr. 179] is there anything to identify it?
A There are two items, one of which is attached to the device. It's an evidence tag that bears my signature with the date 3/25/91. In addition to that at the rear I've scratched in my initials R.C.
Q And why did you scratch in your initials?
A Because of the absence of the manufacturer's identification or a serial number.
Q So you test-fired this with and without the silencer, is that correct?
A Yes, sir.
Q Did you notice with your own ears a difference in sound?
A Yes, I did.
Q Do you have an opinion as to what Government's Exhibit No. 5 is?
A Yes, sir, I do.
Q And what is that opinion?
A That it is a firearm silencer as defined within the Federal firearms statutes.

* * * *

DIRECT EXAMINATION OF DALE ARMSTRONG

* * * *

[Tr. 195] BY MR. BARDFELD: Mr. Armstrong, just focusing your attention again back to March 15th, 1991, you had been out to District 8, is that right?

A That's correct.

A And you were about to interview the defendant George Rogers, is that right?

A That's correct.

Q Can you identify George Rogers, the person that you interviewed that particular night?

A Yes. He's seated right here in the short sleeved shirt, white with checks on it.

Q Wearing glasses and having a mustache?

A Wearing glasses with a mustache.

MR. SALANTRIE: I will stipulate this is George Rogers seated next to me.

THE COURT: Very well.

BY MR. BARDFELD:

Q And on March 15th you did interview George Rogers?

A Yes.

Q Did you tape record that interview?

[Tr. 196] A Yes, at his request.

Q I show you now what's been marked as Government's Exhibits 12-A and 12-B; can you identify those exhibits?

A Yes, I can.

Q What are they?

A They are two copies, two redacted versions of the original tape recorded conversation made on that evening.

Q Have you had an opportunity to listen to Government's Exhibit 12-A and 12-B?

A Yes.

Q Do Government's Exhibits 12-A and 12-B accurately depict the conversation on March 15th, 1991 as you remember it with the exception of those redacted portions?

A Yes.

MR. BARDFELD: At this time I would move for the admission of Government Exhibits 12-A and 12-B into evidence.

MR. SALANTRIE: No objection from the defense.

THE COURT: Very well. Received. The tape is received in evidence only the tape.

[Government's Exhibit No. 12-A and 12-B were received into Evidence.]

BY MR. BARDFELD:

Q I now show you what is marked Government's Exhibit 12-C; can you identify that?

A That is the transcript with redacted portions of the [Tr. 197] conversation.

Q Have you had the opportunity to review that transcript while listening to the redacted tapes?

A Yes.

Q And does that transcript accurately depict the interview as you remember it on March 15th, 1991 with the exception of the redactions?

A Yes.

MR. BARDFELD: Your Honor, may I publish Government's Exhibits 12-A and 12-B to the jury and play the tape for them?

THE COURT: Play the tape because it's in evidence. The transcripts --

MR. BARDFELD: May I also pass out --

THE COURT: You may distribute it to the jury - but again, folks, I want to remind you it's the tape that's evidence, not the transcript. So if you find a discrepancy between what

you are hearing and what you are reading disregard what you are reading. Concentrate on what you are hearing.

BY MR. BARDFELD:

Q Before I get to playing the tape I do have a couple of questions: Who was at the interview?

A Myself, Drug Enforcement Special Agent Joe Kilmer, Broward County Sheriff's Office Detective Bob Faulkner and [Tr. 198] several other Broward sheriff's deputies from that district.

Q And anyone else?

A And George Rogers.

MR. BARDFELD: Your Honor, if I have a question about the tape should we stop the tape?

THE COURT: Pardon?

MR. BARDFELD: Should I stop the tape when I have specific questions about it or should I --

THE COURT: Sure.

MR. BARDFELD: -- let it play through the whole time?

THE COURT: Sure.

MR. BARDFELD: May I play the tape?

THE COURT: Please. Proceed.

BY MR. BARDFELD;

Q Do you have a copy of the transcript with you?

A Yes.

TRANSCRIPT OF AUDIOTAPED POST-ARREST INTERVIEW

[Tape played as follows:]

DA: Okay, the time is 3:15 a.m. or 3:22 a.m, the date is 3/15. The following conversation is between George Rogers and Dale Armstrong with ATF, Joe Kilmer with DEA and Bob Faulkner from Broward County Sheriff's Office and witnessed by three other Broward County Sheriff's officers.

The Statement of Rights:

[Tr. 199] Before we ask you any questions, it is my duty to advise you of your rights. You have the right to remain silent. Anything you say can be used against you in court or other proceedings. You have the right to consult an attorney before making any statement or answering any question and you may have him present with you during questioning. You may have an attorney appointed by the Court to represent you if you cannot afford or otherwise obtain one. If you decide to answer questions now with or without a lawyer, you still have the right to stop the questioning at any time or to stop the questioning for the purpose of consulting a lawyer. However, you may waive the right to advice of counsel and your right to remain silent. And you may answer questions or make a statement without consulting a lawyer, if you so desire.

GR: Okay.

DA: George, the officers that arrested you told me that in the pick-up you were driving were all, were all these items. Now, you're saying some are yours and some aren't yours.

GR: Yes, sir.

[Tr. 200] DA: Okay, which ones are yours? Is this one yours?

GR: Yes, sir.

DA: Okay, the -- George is pointing to a .22 Magnum Freedom Arms --

BY MR. BARDFELD:

Q Which particular exhibit up there is the transcript referred to at that time? Do you have it?

Sorry about that. We didn't bring everything that was introduced up.

A He's referring to this. It's a -- All these guns are safe, by the way, they've got clips in them; they're safe right now -- This is the .22 Magnum Freedom Arms four shot miniature revolver he's referring to.

Q That is Exhibit No. 1 -- Exhibit No. 7? I'm sorry.

A Exhibit 7.
Q Exhibit 7. Okay.
[Tape continues:]
.. four shot miniature revolver, serial number 817914. And this one?
GR: Yes, sir.
DA: Okay, George is --
BY MR. BARDFELD:
Q Which one is he referring to now in the interview?
A The Baretta .380 caliber semi-automatic pistol.
Q And what is the exhibit on that one?
[Tr. 201] A Exhibit 9.
[Tape continues:]
... pointing to a Baretta .380 caliber semi-automatic pistol, serial number A46113Y. Anything else over here?
GR: I don't know anything about those things.
DA: Okay.
GR: And I definitely know what they are.
DA: You do.
GR: Yes sir.
DA: Okay, what are they?
GR: One is a, that is a .380, I think a MAC.
BY MR. BARDFELD:
Q Which one was he referring to at that time?
A He's referring to the .380 MAC-11 semi-automatic pistol.
Q Government Exhibit?
A Government Exhibit 2.
[Tape continues:]
DA: Okay.
GR: And the other is a, that is a silencer.
THE WITNESS: He's referring to the silencer, Government's Exhibit 5.
[Tape continues:]
DA: Okay.
GR: That is a suppressor.

[Tr. 202] THE WITNESS: He's referring to the suppressor here and that is Government's Exhibit 6.
DA: All right.
GR: I don't know what that is.
DA: Okay.
GR: I think that is a magazine feed.
THE WITNESS: That's also part of Government's Exhibit 6. It is a magazine feed that just pushes bullets into a magazine faster than you can do it by hand.
[Tape continues:]
DA: Okay.
GR: And that's magazines.
DA: Okay, but you don't know whose these are or whether or not they're yours?
GR: No, sir, they are not.
DA: Okay, do you know how they got in your, in your pick-up?
GR: No, sir.
DA: No?
GR: I don't even know where they were.
DA: Okay.
GR: That is my tool case right there.
DA: That is your tool case, the black tool case?
GR: Yes, sir.
BY MR. BARDFELD:
Q And, which tool case?
[Tr. 203] A He's referring to Government's 1, the black tool case.
[Tape continues:]
DA: Right.
GR: Now, that was searched.
DA: Right.
GR: Less than a month ago by the Broward County Sheriff's Department.
DA: Okay, the tool case was.

GR: Yes, sir.
A: Okay.
Do you own a 10 mm?
GR: Yes, sir.
DA: A Colt 10 mm.?
GR: Yes, sir, I do.
DA: Okay, that where these two clips come from?
THE WITNESS: He's referring to these clips that are Government's Exhibit 13, two clips to a Colt 10 mm. pistol.
[Tape continues:]
GR: Yes, sir.
DA: Okay.
JK: Where would that gun be at this time?
GR: That's at my home.
DA: Okay, did you buy those guns yourself?
GR: Yes, sir.
[Tr. 204] DA: Okay, so if I trace them they'll come back probably to you buying them on -- Did you fill out a 4473?
GR: Yes, sir, I did.
DA: A yellow form, okay, and they'll come back to you.
GR: Yes, sir.
DA: Okay, but, you have no idea whose these --
GR: I've never seen them in my life, sir.
DA: Okay.
GR: I have a lot of weapons, I, I'll not deny that, but I do not go with bullshit like that.
DA: Okay.
GR: That case was in my truck.
DA: Right.
GR: Ah.
DA: The black tool case.
GR: And I don't want no part of that bullshit; I don't deal in automatics.
DA: Okay.

GR: If you want to ask me how to make a silencer, I'll tell ya. You get, you get a god damn oil filter, that's the best silencer you can get. Don't they teach you that in, in, in Special Forces? That's what they taught me.
DA: Yeah.
GR: All right. Don't, don't, don't hang that bullshit [Tr. 205] on me. I don't want it, I can't afford, I can't do it.
JK: George, when was the last time you looked in your bag?
GR: I've never looked in the bag since I was arrested, never. It's been in the back of my pick-up truck. I've never had any reason to. I've never had any reason to. We just changed the whole bed in my pick-up truck, and I never looked in that, that tool...the only thing that was in that tool pouch was, was, a set of channel locks, a set, a set of metric tools, metric sockets, standard sockets in a, in a metal case, the ratchets and that's it. That's all that was in there.
DA: Well, where were you coming from tonight when they, when they stopped you?
GR: I had been wrapping rods at Jim's Going Fishing, I'm making myself a rod, I wrap rods.
DA: Okay.
GR: And I had wrapped a rod because it's a very tedious wrap and it's for me.
DA: Uh-huh.
GR: I had, had two or three beers; we had, had a pizza.
DA: Yeah.
GR: I came through Davie, I stopped in Davie at a bar. The crowd was rough ...
[Tr. 206] D : Yeah.
GR: Not for me, got back in my car, came right straight home.
DA: Okay.

GR: They, they said they seen me weaving on Hiatus. If I was weaving it's because that earlier this morning there was a tire.
DA: Right.
GR: In Hiatus, that was, what do you call, had metal in it.
DA: Okay.
GR: And it was still there tonight.
DA: Okay, it was a blow-out and it was in the road.
GR: Yes. My social security is 406-50-4016. I don't know what you want.
DA: Do you know, do you know what these are?
GR: Yes, sir.
DA: What are those?
GR: Those are baffles for a silencer.
THE WITNESS: He's referring to Government's Exhibit 10.
MR. BARDFELD: What is a baffle?
THE WITNESS: Baffle goes in the end of a silencer and they are made out of rubber and there's a little tiny hole in the middle and it traps any gas that would make it through the silencer towards the end and wouldn't be able to escape [Tr. 207] and make a noise and that traps the last bit of gas and they wear out after a while and you need replacement ones. Bullets coming out take pieces off of it.
[Tape continues:]
DA: Okay. Are these, these are new ones?
GR: Yes, sir, they are.
DA: Okay, and what would you do with these?
GR: Put them on end.
DA: Put 'em, exchange them in the, for the other, the old one?
GR: If they were worn out, you would.
DA: Yeah, okay.
GR: I'm not going to lie to you. Those are my bullets right there that he just laid down.
DA: These?

GR: These, those are mine.
THE WITNESS: He's referring to a bag of bullets that one of the deputy sheriffs came over and placed on the table as I was speaking to him.
MR. BARDFELD: What exhibit is that?
THE WITNESS: That is Government's Exhibit 11.
[Tape continues:]
DA: These are, okay.
GR: Those are all .380's.
DA These are .380's?
[Tr. 208] GR: Yes, sir.
DA: Okay.
GR: That belongs to that right there and there should be a magazine to that.
DA: Okay.
GR: Two mag...there should be two magazines for that. That's it. There should be some Hydra Shok.
DA: Right.
GR: And that's my knife right there with my name on it.
DA: Okay.
GR: And I bought this at the gun show with a police officer named Alan Marshall, went to the...went to the show with me. And you can verify that.
DA: Okay.
GR: Officer, I do not deal in that shit down there and anybody they that knows me, you can check twenty years back, they do, they know I do not deal in that bullshit there. I'm scared to death of it.
DA: Okay. They look like the exact same rounds in these clips, though.
GR: Try it.
DA: It's a, it's made by the...the clip to the M-11 and the bag of bullets for your Baretta have the same exact ammunition. The make and the caliber and everything.
GR: They're not mine.

[Tr. 209] DA: Okay. Okay, well, George, do you own any other guns?
GR: Yes, sir.
DA: What do you have?
GR: I have a... a 10 mm. at home.
DA: Right.
GR: Stainless.
DA: Right.
GR: I have a .45, I have a .45, target gun.
DA: A .45 target, okay; is that a Colt, also?
GR: Yes, sir.
DA: Yeah.
GR: I have a Glock.
DA: A Glock.
GR: Yes, sir.
DA: The 9, 9 mm. Glock.
GR: Yes, sir.
JK: Do you have any fully-automatic weapons?
GR: No, sir, I do not, never, ever, never have I ever.
DA: How did you, how did you learn so much about, about silencers?
GR: I studied.
DA: Studied?
GR: Yes, sir.
DA: Okay.
GR: In fact, if you probably go to my house now there's a [Tr. 210] book on silencers.
DA: Okay.
GR: And there's probably all kinds of gun magazines that I read.
DA: Okay, but there wouldn't be any silencers? Or?
GR: No, sir, there would not. No, sir, there would not be.
DA: Okay.
JK: Would there be any other kind of contraband in your house, George?

GR: What do you call contraband?
DA: Well, like, anything that's illegal, any illegal firearms or any illegal drugs or anything like that? You know, narcotics?
GR: No, sir.
DA: No?
GR: Absolutely not, I don't take that, I don't even ...
JK: If we were, if we were to ask you for consent to look in your house.
GR: You absolutely can.
JK: Okay, is there anybody there that would be able to let us in?
GR: Take my keys, you got them.
JK: No, I mean, is there anybody else living at your residence?
GR: No, no, sir.
[Tr. 211] JK: No, just you, that's it?
DA: Do you have any dogs or animals at the house?
GR: No, sir. There's, there's, I, I, has, there's no hesitation, you can go over my house right now.
JK: George, looking at this candidly, okay, this is the problem that myself and Agent Armstrong see that you're in. Okay, you're in your vehicle that's registered to you; you've got a gun on your person --
GR: Yes.
JK: By the way, do you have a permit, a carry permit?
GR: No, I carry that in the store.
JK: Okay.
GR: And I came straight from the store.
JK: Okay. And, okay, you've got this, you've got the small .22 and then the .380...
GR: The .380 was in a package zipped and locked.
DA: Right, okay.
GR: Wasn't it, sir?
DA: Yeah, that's what I believe.

GR: Yes, it was and that one, right?
JK: But also, what you have in your car...
DA: No, it wasn't.
GR: Yes, it was.
DA: It was under a hat.
GR: No, sir, that was in that case right there.
[Tr. 212] JK: Okay, listen. We're not here to argue with.
GR: Yeah, okay.
DA: Yeah, well, we won't even talk about this, then.
GR: Wasn't it, also, wasn't it in that zipped case right there?
BF: That gun was under that hat right there.
JK: This Baretta was under the hat?
BF: Cocked and loaded.
DA: And then this one was in your pocket.
GR: That's, that was in that zippered case.
JK: George, listen, okay?
BF: The small one was in his pocket.
DA: Was this in your pocket, though?
GR: Yes, sir.
DA: It was in your pocket.
GR: I carry that in my pocket in the store at all times.
DA: Okay, okay, but see...
GR: And I, I even went through the gun show with a police officer, with it, the other day; and you can verify that.
JK: The problem you're gonna have...
GR: I'm not a criminal.
JK: No, I know. The problem is that we perceive that you're going to have, okay, is that you're going to go before a judge with a gun in your pocket and one nearby under a hat and also a bag...
[Tr. 213] GR: That was not, that...
JK: George...
GR: That was in that zippered case...
JK: George, just let me finish, okay? I'm just telling what the facts are right now as, as we see them, okay? And

that you have your two guns, one gun with you, on your person, another gun close by under a hat...
GR: But...
JK: In the vehicle that's registered to you you've got a fully-automatic MAC-11 with a silencer.
GA: That is not my weapon.
JK: George.
DA: Okay.
JK: Just listen to what I have to say.
DA: Just listen to him.
JK: I'm not going to say whether it is or isn't; I'm just going to say what the judge is going to hear. Okay, that, that in your vehicle there's plenty of ammunition, a silencer and a fully, MAC-11 machinegun. Okay. Now, just from what we've said, it's my feeling that the judge is going to feel that regardless of what you say, that, that gun was yours.
GR: It is not mine, sir.
JK: Okay, well, I'm sure you can argue that and that's what an attorney's for, but we're here right now to see if [Tr. 214] you may have a change of heart, there may be something you might want to do to help extricate yourself from this situation.
DA: If you know anybody, you know, that's making these...
GR: I have nothing.
DA: Or dealing in these.
GR: You can print that, you can do whatever you want to do. These two weapons are mine.
DA: Uh-huh.
GR: All the police officers that I know can verify that, I carry this gun by the register the .380 the other .22 I carry in my pocket at the store.
DA: Okay.
GR: The knife has got my name on it.
DA: Right.

GR: I make knives.
JK: Okay, we're not really concerned with any of these three, okay, Agent Armstrong is concerned with what's over there.
GR: You...
JK: Because he will tell you that...
GR: Agent Armstrong, call the Sheriff's Department that called me and searched my truck they went through that pack...
DA: Yeah, but that was three weeks ago, right?
[Tr. 215] GR: I have not touched it since.
DA: Okay.
JK: Well, that's all the more reason, okay you're acknowledging that, that pack is owned by you...
GR: Yes, sir.
JK: In your vehicle...
GR: Yes, sir.
JK: Well, how do you think a judge is going to react when he hears that in your vehicle there's a pack that you identify, that a police officer has already seen you within your car, but yet strangely there's a fully automatic weapon and a silencer, both of which are extremely illegal, in your vehicle, but yet you're claiming you have no knowledge of how they got there...
GR: I have no knowledge, none.
JK: Don't you think that's going to strike a judge as kind of odd?
GR: I have no idea. Why didn't they find it three weeks ago? In the same pack?
JK: Well, I guess the logical person would say that it probably wasn't there three weeks ago.
GR: It was three weeks ago, and they can say, they will verify it. Because they opened it.
DA: The pack was.
JK: Maybe the pack was.

[Tr. 216] GR: It was opened three weeks ago.
DA: Okay.
JK: But it didn't include the weapons at the time.
GR: And I have no idea where they came from now.
DA: Okay, George. George, you ride with anyone, you ride with any, any clubs in the area?
GR: What do you mean?
DA: You ride Harleys or anything?
GR: Oh, no, no. I'm thinking of buying a police bike from one of the officers.
DA: Yeah, what was the bar you were at tonight, earlier tonight, do you remember? You came to, after you ate pizza you went to a bar for awhile.
GR: No, I didn't go for a while. I went in and I...
DA: You didn't like the crowd?
GR: I didn't have any money.
DA: Okay.
GR: I checked out my wallet and I didn't have any money so I left.
DA: Okay, do you remember the name?
GR: It was the one in the middle of Davie, that's the only...
DA: Okay.
GR: I think some guy bought me a drink and I, I said the hell with this, I don't have any money, I'm going home.
[Tr. 217] JK: Okay.
GR: That was it.
DA: All right. Well, George, I don't know what else I can say to you. You're willing to give us a consent to search your house.
GR: Yes, sir, right now.
DA: Okay, Bob...
GR: And I'll tell you what you're going to find. You're going to find my, my Glock...
DA: Uh-huh.
GR: Underneath the pillow...

DA: Uh-huh.
GR: And, you're going to find two magazines on the nightstand, and that's it.
DA: Okay, and a, and a book on silencers or something like that.
GR: There's a book, I think, unless I packed it away. I don't know.
DA: Okay.
GR: Some screwball book I bought at a gun show.
DA: Okay, anything...
GR: But it's nothing we weren't taught.
DA: Okay.
GR: You know, you want a silencer, you, you, you get a, what's the best silencer?
[Tr. 218] DA: Sionics.
GR: No, it's, it's a two liter bottle. I mean everybody knows that, I mean this...
DA: A two liter Coke bottle you're telling me...
GR: Yeah, this bullshit is not mine. That's not mine.
JK: George, like I said, we're not here to try to, upset you or intimidate you, anything.
GR: I am upset.
JK: Okay, well, let's...
GR: I don't deal in this.
JR: Well, just listen to what I have to say, okay. All I'm saying is there are some very, you know, Agent Armstrong will tell you what the minimum mandatory jail sentences are...
GR: You don't have to; I know.
JK: And the case against you right now is pretty strong. Okay, you have two police officers who stopped you for DWI and this is what they find, okay?
GR: I wasn't drunk.
JK: We're, well, I'm not going to debate that. I'm simply saying they had a reason to stop you. They had a reason

to arrest you and this is what they find. And Agent Armstrong is just here to see if you may want to cooperate with the government. If, if your stance is that you do not know how this stuff got there.
[Tr. 219] GR: Absolutely not.
JK: Then that's fine. But you should understand that you're facing a minimum mandatory Federal jail sentence.
GR: These are my two weapons and my two magazines.
JK: Okay, we're not worried about those.
GR: This is my knife, that's the only thing I know about.
JK: Okay.
DA: By two weapons, you're referring to the .22 and the .380 Baretta.
GR: Yes, sir.
A: Okay. I just want to make sure you don't, you don't mix your stuff or start claiming over here. Bob, you want to ask George anything?
BF: What's your middle name, George?
GR: Glenn.
BF: Do you have a phone at home?
GR: Yes, sir.
BF: What's the phone number there?
GR: 474 -- Oh, God.
DA: You all right?
GR: I just got very dizzy.
DA: Oh, okay.
GR: -- 1975.
BF: What's your phone at work?
GR: 963-2499
[Tr. 220] BF: Do you ever go over J & S Lounge?
GR: No.
BF: You have a nickname, George?
GR: Sonny. That was way back when I was a kid going through school.
DA: You know Stanley Mumford?

GR: No, sir.
BF: How much do you weigh, George?
GR: Oh, about 200, probably, now.
BF: Yeah, you got to lay off the Budweisers.
GR: I don't drink?
BF: No?
GR: No, I can't drink anything.
BF: You got any tattoos, George?
GR: No, sir.
BF: Scars?
GR: I have a scar on my right ankle.
BF: So, you don't own a bike, right?
GR: No, I do but it's, I have a Suzuki that is, hasn't been, hasn't run in years. It's sitting on the porch. If I lie to you, you can go and see it.
BF: You know Parts Pete?
GR: No.
BF: It's on your porch?
GR: I've had it for years. It's just sitting there. In [Tr. 221] 1981 I got it.
BF: How long you lived here in South Florida?
GR: Since 19678. I got shot four times in 'Nam and I can't take the cold weather.
BF: I never got shot in 'Nam and I can't take the cold weather.
GR: Was you there in 'Nam?
BF: No, Korea; I'm older than you.
GR: No.
BF: No, you're born in the same year I was.
DA: That's it? Well, I got nothing else to, to ask you, George. These gentlemen will probably want to be taking you tonight.
GR: Am I gonna get these back?
DA: Well, well, George, they're going to be retained as evidence right now.

JK: You're probably going to jail.
DA: Okay, they are going to be retained.
GR: Print those there, there's no prints of mine on them.
DA: Okay, we're going to.
GR: There's no prints. Because I want to tell you something, because that case was in my truck--

BY MR. BARDFELD:

Q That case, again we are referring to Exhibit No. 1, the black canvas bag?
[Tr. 222] A Yes, Exhibit 1, the black canvas bag, he refers to as a tool bag.

[Tape continues:]

-- and it's been there ever since.
JK: Well, that's a given right now. If there comes a time when your mind gets a little clearer, okay, then you might want to call Detective Faulkner or Agent Armstrong 'cause you really are in a lot of trouble.
BF: Where were you born?
GR: Newport, Kentucky.
BF: Newburke?
GR: Newport. How can I be in trouble when that doesn't belong to me?
JK: I think a judge is going to see it, otherwise. Well, I guess that's why you will get an attorney, but the evidence ...
GR: What happens if I don't have the money for an attorney?
DA: They'll give you one. That's when I read you your rights. When I read yours I said you'd get an attorney appointed by the Court.
GR: What happens to a slob like me when the law goes against them?
JK: What are the minimum mandatories on this?
GR: You just yo-yo right, you just be one of the guys against the poor slob like me, right. [Tr. 223] I know the law,

I sold guns. I know what this is and it don't belong to me and that shit.

DA: Okay, just calm down, George. All right. We're gonna check into it.

GR: I never dealt in that, I never bought any of it. I never done that shit, I could make silencers, for Christ's sake, I could do, I could do anything. But I never, ever, ever did that, never, never.

DA: All right, George, just calm down.

BF: What's your Social Security number?

DA: 406-50-4016.

BF: Little slower.

DA: Just calm down.

GR: 406-50-4016. If you check my fucking military records, you know, I know all about this bullshit. You can check back from 1973 when I worked at Bob X. I never even liked this shit. It was always trouble. I've never been in this bullshit, never, never, never.

DA: All right, George, just calm down. We're not going to talk about these any more. If we give you a consent, a consent to search form, will you sign that giving us consent to go search your house?

GR: Yes, sir.

DA: Okay, without reservation?

GR: There's nothing in my house.

[Tr. 224] DA: Okay, so you don't mind if we go look in it?

GR: No, sir, none.

JK: You have the right to refuse that.

GR: There's nothing there. I don't have nothing to hide.

JK: Okay.

DA: Okay, George. We're not here to pick on you or anything like that. We're just here to find out what's going on. That's all.

GR: You call the Sheriff. You locate the Sheriff that seen that pack in my truck and she will tell you that pack had tools in it.

DA: Okay. Well, we're gonna do that, George, don't worry. Don't worry about it.

GR: Oh, oh, oh, don't worry about it. I'm looking at twenty fucking years right here. I know what this is.

DA: How do you know that's twenty years?

GR: Silencers, and you said that was a full automatic. That's twenty years.

DA: I know. You're right.

GR: That, I put that on there myself; that's not against the law, is it?

DA: No.

GR: No, it's not.

DA: That's just a little flash suppressor.

[Tr. 225] GR: I was gonna, no, I was gonna, I was going to do that to the .380, sir, or the 92, so the officers could put that in there. I even have an invention that a police officer can put a chip in his finger and there would be a servo in the, in the gun and only a police officer could fire the weapon. Colt wants it so bad.

JK: How would you get a chip inside your finger?

GR: Cut it, put a chip, about as big as a head of a pin.

JK: Robo-cop.

GR: No, no, no, it's not, it's very simple. All you have to have is a memory on the trigger.

BF: Like a key in the ignition.

GR: Yeah. If it, if it's, you have the sensor in the trigger, you can have a chip in the finger that has a servo in the grips that blocks the trigger. And only, and when that, when you put your finger against it, it throws it back. Anybody else puts it there, it won't work.

BF: So, you don't know Parts Pete, huh? Never heard of him?

GR: Never heard of him, never heard of him.
DA: Give us your address, George, Lot 380.
GR: 10550.
DA: Yeah.
GR: West State Road 84, Lot 380.
DA: And that's in, in Davie?
[Tr. 226] GR: Well, it's unincorporated.
DA: Okay.
GR: Oh, God.
DA: All right, why don't you read this. This is the consent form.
GR: I can't, I don't have my glasses.
DA: Do you want me to read it to you?
GR: Yes.
DA: Okay. "I, George E. Rogers" --
GR: George G.
DA: George G. Rogers, okay.
-- "George G. Rogers, having been informed of my constitutional right not to have a search made of my premises, hereinafter mentioned, without a search warrant, and of my right to refuse to consent such a search, hereby authorize Dale Armstrong of ATF" -- that's me--"Joe Kilmer of DEA, Bob Faulkner of the Broward Sheriff's Office and other deputy sheriffs of the Broward County Sheriff's Office in Ft. Lauderdale, Florida, to conduct a complete search of my residence and/or vehicle located at 10550 W. State Road 84, Lot 380."
[Tr. 227] And you say it's in Davie or is it Fort Lauderdale?
GR: Unincorporated Fort Lauderdale.
DA: Unincorporated Fort Lauderdale, Florida. Okay.
"These Deputy Sheriffs are authorized by me to take from my residence any letters, papers, materials or other property which they may desire" -- which we may need

to retain as evidence. "This written permission is being given by me to the above names of the Deputy Sheriffs and other agencies voluntarily and without threats or promises of any kind." Is that okay?
GR: That's fine.
DA: Okay. Sign right there and then we're going to sign in the witness, the witness blocks.
GR: Who's gonna be there while you're doing the search?
DA: The three of us and them.
GR: Can I have, can I have somebody there while you're there?
BF: Sure.
DA: Yeah.
GR: When are you going?
DA: We're gonna go right now.
GR: Okay, let's, let's wait and somebody else there before [Tr. 228] you get there or while you're there.
DA: Okay. Who else? Who else do you want?
GR: I want ...
DA: Another Deputy or ...
GR: No, no, no, no. I want, I want anybody to walk in with you so you won't plant something like that.
JK: Do you want to be there?
GR: Yes, oh, I'd love to be there.
DA: Okay.
JK: 'Cause getting somebody up at 4:00 in the morning could be a little tough, okay?
GR: Oh, God, please, if you handcuff me, don't handcuff 'em so tight. My hand is swollen so bad. I'm not going to go anywhere. I have nothing to hide.
DA: Okay, George, we're gonna ...
GR: Can I go with you ...
DA: You're going with us.
GR: You're damn right I'm going to go. I have nothing to hide.

DA: Okay.
GR: Right there? Right there, just sign right there?
JK: And then date it. It's now March 15th at 4:00 a.m.
GR: With this pen?
DA: Yeah, just write 3/15/91 on there.
[Tr. 229] GR: Three?
DA: 3/15/91 and that's the date.
BF: George, you got a little mini-storage shed?
GR: Yes, sir.
BF: What do you got in there, just personal stuff?
GR: I have rod building equipment, tools, tires. You're welcome ...
BF: Just stuff.
GR: You're welcome to look in it.
BF: Just stuff that you don't have room for at home?
GR: Sir, I have nothing to hide.
DA: We believe you.
GR: I have nothing. I swear to my Christ above, I have nothing and I'm scared to death. I know you guys and I'm scared of you.
DA: Well, there's no reason to be, George.
GR: Bullshit.
JK: We're gonna, they will.
DA: We will, we can do that.
JK: When you say stopped, was that when you got arrested for DWI a month ago?
GR: Yes, sir.
JK: Okay.
GR: She went through that, because that pack was moved, that pack was went through, my tools was in it and I have not [Tr. 230] moved it since.
JK: You have other people that usually drive your vehicle?
GR: No, sir.
JK: You're the only one ...
GR: Yes, sir.

JK: That has the keys to it?
GR: No, well, I'm the only one that has the keys to it, yes. So, you're the only one who really exercises control over that ... Yes, sir.
JK: Truck.
GR: And nobody has driven that truck since.
JK: Okay.
GR: And we have had the bed off of it, we have put a, diamond plate bed on it.
JK: I believe you, no problem.
DA: Okay.
JK: We understand where you're coming from.
BF: Let's go take a peek.
DA: Yeah, we're gonna go by your house. Stay right there while we get some handcuffs. Okay, I'm gonna turn off the tape recorder and we won't talk to you any more. We'll take you out there and any time we're gonna talk to you we'll turn the tape recorder on.
GR: You don't have to do that.
DA: You don't mind?
[Tr. 231] GR: No, sir.
DA: Okay.
GR: I have nothing to hide.
DA: Okay, well, you just wanted it on before so ...
GR: To make a statement that, that, that does not belong to me. The two guns right there and my knife and these two 10 mm. magazines ...
DA: Okay.
GR: And these magazines ... belong to me.
DA: But, but you don't own that, that ...
GR: No, sir, I've never seen that.
DA: Okay, okay. I'm gonna end this tape. The time is now 4:07 on 3/15/91. It's Friday morning and we're on our way to George's house to see, to see what's there and, good night.

* * * *

CONTINUED DIRECT EXAMINATION OF DALE ARMSTRONG

* * * *

[Tr. 235] Q. Did you send the firearms, Government's Exhibit 2 and Government's Exhibit 5, to Washington for analysis?

A. Yes.

Q. Did you also send them for fingerprint analysis?

A. No.

Q. Why not?

A. Well, for several reasons: first, initially, after I arrived at the scene about 1:30, the firearms were out on a table and the deputies had already pretty well handled them, handling the firearms, and that's not too good for fingerprint [Tr. 236] preservation.

Q. Why is that?

A. Well, when you handle it, you're just putting your fingerprints on top of the ones that were there and wiping those out or smearing them or smudging them.

Secondly, as you can see, this silencer has a cloth sheath over it. You're not going to have any fingerprints on it underneath. The person who put the cloth sheath on there wiped off any prints that were going to be on there when they put the sheath on there.

Additionally, if I was to remove this to try and have it fingerprints, it's just going to wipe off any fingerprints that happened to be saved, they'll be gone.

This end, you will see, is a porous surface, it is not a smooth surface, the very end here, and you aren't going to be able to get prints off of that and the chances of someone putting

their hands down there to screw it on anyways -- because that's the end that goes on the gun -- is highly unlikely.

This weapon is what they call a Parkerized finish. It has, opposed to the Baretta which is a smooth black finish, a satin black matte or other firearms are in a blue or stainless finish. Those maintain fingerprints very well and you have good results getting fingerprints off them. Parkerized finish you can tell just by looking at it and feeling it, is not a [Tr. 237] smooth, glossy finish, it doesn't hold fingerprints well, and after the deputies handled it and with this type of finish, it's ridiculous to even try.

And the third reason, of course, being our lab is overloaded and I'm not going to send them something like this when it's in somebody's vehicle registered to them and they tell me there right in the interview they are the only ones who have exercised control over their vehicle.

* * * *

PRELIMINARY CHARGE CONFERENCE

[Tr. 240] THE COURT: Anybody who has any instructions other than pattern instructions?

MR. SALANTRIE: Yes, Your Honor. I prepared three and presented them to your clerk, law clerk. I provided them to Mr. BARDFELD also.

THE COURT: Well, this one about constructive [Tr. 241] possession is almost the same as the standard possession instruction that was given in this Circuit and previously in the Fifth Circuit; although, frankly, the juries do not understand that possession instruction. I have discussed it with enough of them to know that.

MR. SALANTRIE: Judge, there is one --

THE COURT: I haven't a better one, unfortunately. Well, there is one out of one of the circuits that I think is a little clearer.

MR. SALANTRIE: May I address that for one second? The only addition, Your Honor, is that I put in the word "knowingly" which, in fact, reflects what the law is and is cited or stated in U.S. vs. Daniels, 527 F2d 1147.

THE COURT: Well, you can't underline it under any circumstances.

MR. SALANTRIE: Oh, I understand that, Judge. I just did it for emphasis for you. If it's underlined, in the actual instruction, I have no problem if that is deleted, the underlining. I believe it is the law and also it is the defense, our defense.

THE COURT: Pardon?

MR. SALANTRIE: It is the law, I believe, and it is also our defense which has been made fairly clear at this point.

THE COURT: I don't believe this is the law that to [Tr. 242] establish knowing possession of a firearm the government must prove beyond a reasonable doubt that the defendant willfully and consciously possessed an item which he knew to be a firearm. That's not the law.

MR. SALANTRIE: Judge, I am referring to --

THE COURT: There is no willfulness in possession of firearms, illegal firearms.

MR. SALANTRIE: I am citing from U.S. vs. Parker.

THE COURT: And you don't have to know that a firearm, that which is a firearm, actually is a firearm within the meaning of the law. And, by "firearm" I mean a machinegun, sawed-off shotgun, hand grenade, silencer, something like that.

MR. SALANTRIE: I respectfully disagree. I believe U.S. vs. Parker and U.S. vs. Freed make it clear it's not a strict liability offense. They have to establish the person knew it was a firearm and they had to know that it existed. They didn't have to know that it was unregistered or the government does not

have to prove that the defendant knew it was supposed to be registered.

THE COURT: Why don't you check Justice Blackmun's opinion that the Supreme Court used when he was a judge on the Eighth Circuit? I don't think they're correct in their holding but it's there as to that particular facet of this whole problem.

[Tr. 243] MR. SALANTRIE: I also did cite a Supreme Court of the United States case, United States vs. Freed, which I don't have the entire case with me, which I can provide that, that is cited in United States vs. Gates which I provided to the Court. It's a Seventh Circuit case, 1974 and on Page 721 it states:

> "We must assert whether the evidence together with all reasonable inferences and viewed in the light most favorable to the government was sufficient to prove that defendant was guilty beyond a reasonable doubt of violating 26 U.S. Code 5861(d)."

I believe that is the possession of the unregistered firearm.

> "In so doing we are guided in our determination by United States vs. Freed,"

which is cited on my jury instruction. And, in his concurring opinion, Mr. Justice Brennan enunciated the quantum of proof necessary to sustain a conviction under that particular statute:

> "To convict appellee of possession of unregistered hand grenades or hand guns the government must prove three material elements: Number one, that appellees [Tr. 244] possessed certain items; two, that the items possessed were hand grenades" -- or in my situation were firearms -- "and, three, that the hand grenades were not registered. The government and the court agree that the prosecutor must prove knowing possession of items and also knowledge that the items possessed were hand grenades" -- and I would argue by extrapolation, they were firearms. "Thus, while the court does not hold that no

> intent at all need be proved in regard to one element of the offense, the unregistered status of the hand grenades, knowledge must still be proved as to the two other elements."

So, basically, they're saying as to whether or not a defendant knew the hand grenades were unregistered they don't have to prove that knowledge; but the government does have to establish knowledge as to the other two elements, be it that they were possessed and that they were firearms.

Since the government here is not proceeding -- at least I don't think proceeding -- on an actual possession argument and in all likelihood proceeding on a constructive possession argument, they have to establish an ability to [Tr. 245] maintain control or dominion over the items which they could probably very easily do because it's in his truck right behind him. They also have to establish he knew they were there, had knowledge of their existence; without that, there is no constructive possession.

And that's why I submitted that jury instruction on constructive possession. The pattern instruction does not include the word "knowledge" or "knowingly." However, the indictment mentions knowingly on all three counts, charges knowing possession, and I think the law on constructive possession is stated in Parker as well as United States vs. Freed, which states that the government has to prove knowledge of the existence of the items.

Mr. Rogers' defense, quite clearly, from the statement is, he had no knowledge that they existed. That has to be a defense. If the jury were to believe he was without knowledge, he is not guilty. If they believe he did have knowledge, then he is guilty. But there is nc pattern, I didn't find a pattern instruction, that addressed the knowledge aspect of it. I had to go to the case law. And in United States vs. Parker it states:

> "To establish knowing possession" -- and that is what he is charged with in the indictment, knowingly possessing -- "To establish knowing possession of [Tr. 246] unregistered firearm" -- and it's in the second head note, Your Honor, under Internal Revenue 2410 -- "government was not required to prove in addition to fact that defendant willfully possessed the weapon that he had no good reason to justify the possession. Government, rather, was only required to show that the defendant willfully and consciously possessed the item which he knew to be a firearm."

And, based on those cases, those three cases that I have submitted, as well as Freed, which is mentioned in United States vs. Gates, which is the long opinion, I just didn't have a chance to make a copy of, I submit that the three -- the two jury instructions relating to knowledge and constructive possession are, in fact, the law, number one; number two, are, in fact, the defense; and, number three, I believe the law is such that a defendant is entitled to an instruction on his defense if it is consistent with what the law is. And that is mentioned in United States vs. Parker in the first head note and that's the Fifth Circuit, as I stated, at 556 F2d 1304 which just says, and I'm just referring to the head note, but it also mentioned in the opinion, Head Note 1:

> "Defendant was entitled to jury [Tr. 247] instruction relating to theory of defense for which there was any foundation in evidence."

There is ample evidence at this point in the government's case of lack of knowledge. It's right in the statement.

* * * *

DIRECT EXAMINATION OF GEORGE ROGERS

[Tr. 291] GEORGE G. ROGERS, DEFENDANT, SWORN.

THE COURT: Please be seated.

Please tell us your full name, your occupation; spell your last name for us, please.

THE WITNESS: George G. Rogers, R-o-g-e-r-s, and I'm totally disabled from Vietnam. I draw a Government check.

THE COURT: Please proceed.

[Tr. 292] BY MR. SALANTRIE:

Q. George, allow me to direct your attention to, was it March, 1991, the time of your arrest; do you recall back then?

A. Yes, sir, I do.

Q. At that time where were you living?

A. I was living off of 84, out in unincorporated Broward County.

Q. And were you working at that point?

A. Yes, I was a fishing guide and I make custom made fishing rods.

Q. Do you have any hobbies?

A.- Yes, sir, I do.

Q. You indicated before that you are totally disabled.

A. Yes, sir, I am.

Q. Are you able to work?

A. For myself, but for no one who has Workman's Compensation insurance.

Q. So when you say you were working back then, were you working for yourself?

A. Yes, I was.

Q. And you said you were making fishing rods?

A. Yes, sir.

Q. For yourself?

A. That night I was making a fishing rod for myself, yes.

[Tr. 293] Q. And how long had you lived in Ft. Lauderdale at that point?

A. Since November of 1968.

Q. And what were you doing prior to 1968?

A. In Vietnam.

Q. Where were you born?

A. Newport, Kentucky.

Q. When did you go to Vietnam?

A. Went to Vietnam in '64.

Q. And when did you get out of the service?

A. 1966.

Q. What branch?

A. I was with the 101st airborne, transferred to the Fifth Special Forces group.

Q. And were you discharged?

A. Yes, I was.

Q. In what fashion?

A. Honorably.

Q. And that was in '66 you indicated?

A. Yes, sir.

Q. And what did you do for the couple of years before you moved to Ft. Lauderdale?

A. I was up home on the farm recuperating from wounds that I'd received in Vietnam.

Q. What were those?

[Tr. 294] A. I had a pungee stick go through my right ankle, I was shot in this hand, in the head and through this leg.

Q. And in '68 you moved to Ft. Lauderdale?

A. I could not stand the cold weather up in the north, I had to come south.

Q. Directing your attention then to the evening of March 15th, 1991, do you recall what you were doing that day or that evening prior to being arrested?

A. That day we had taken the bed off my pickup truck and put a diamond plate liner in it and put it back on.

Q. And what were you doing that evening prior to going home?

A. That evening I was working on my fishing rod, fishing rod that I was making for myself.

Q. And at some point in time did you -- Let me backtrack. Where you doing that, wrapping the rod?

A. You mean the address?

Q. Well, where, yes?

A. The fishing store, the tackle store on Taft Street.
Q. And what time did you leave, approximately?
A. It was about 11:30 or maybe a little later.
Q. What did you do after that?
A. I got in my truck and I started home, went down Davie Road Extension through Davie. As I passed the Beer Barn there was a bunch of pickup trucks and people there. Being a Thursday night which is highly unusual I thought perhaps they [Tr. 295] were having a pool tournament. I shoot pool a bit. I turned around. I went back in.
Q. How long did you stay?
A. Five minutes.
Q. Then where did you go?
A. Home.
Q. At some point in time did you observe red emergency lights?
A. Yes, I did.
Q. Police lights?
A. Yes, I did.
Q. Where were you at that point?
A. I was about 200 yards from my home.
Q. And what did you do when you saw them?
A. They were at a guard shack, they were not behind me and I slowed down to a crawl to see if an ambulance or fire truck was coming into our mobile home park.
Q. And then what did you do?
A. I pulled into my driveway.
Q. And then what occurred at that point?
A. I had a -- The .22 pistol was in my --
Q. What did the police do?
A. They sit there.
Q. Did they pull up behind you at some point?
A. No, not at that point they did not.
[Tr. 296] Q. Okay. Go ahead.

A. I reached over and took the .22 pistol out of my glove box, stepped out of the truck because I could not get it in my pocket sitting in the truck, put it in my pocket, started into my house. That's when the officers pulled in behind me.
Q. And did you have -- Is this the .22 --
A. Yes, that is.
Q. You had that in your pocket?
A. I put it in my pocket when I got --
Q. When the police arrested you it was in your pocket?
A. Yes, it was.
Q. And did you have another gun in the car?
A. Yes, sir, I did.
Q. That would have been Government's Exhibit No. 9?
A. Yes, sir.
Q. This Baretta?
A. Yes, sir, but that Baretta was in a zipped weapons case.
Q. Where?
A. Laying beside me in the truck.
Q. And you left that there when you got out of the truck?
A. Yes, I did.
Q. And at some point in time you were arrested for DUI?
A. Yes.
Q. And the resisting and to carrying concealed firearms, right?
[Tr. 297] A. There actually wasn't the resisting --
Q. I understand, but that's what they charged you.
A. Yes, sir.
Q. And you went to trial on all those?
A. Yes, I did.
Q. And when was that?
A. That was in June of 1992.
Q. And you were found not guilty of all those charges?
A. I was acquitted, yes, sir.
Q. And what occurred after you were arrested?
A. When the officer arrested me --

Q. What did they do with you?
A. -- they put me in the back of the police car.
Q. And do you know what the police were doing at that point?
A. Yes. They were tearing my truck apart.
Q. Back at your home when you were arrested, were you on your own property?
A. Yes, I was.
Q. Were you ever confronted at your residence by any of these items here that were introduced?
A. No, sir, I was not.
Q. Now these cartridges, the black cartridges, the .380 --
A. Magazines?
Q. Yes.
A. Yes, sir.
[Tr. 298] Q. One was where?
A. One was in my pocket.
Q. The other one?
A. In the weapon.
Q. That's the .380 Baretta, correct?
A. Yes, sir.
Q. And these 10 millimeter magazines --
A. Yes.
Q. -- were somewhere, where?
A. They were in the glove box.
Q. Other than these items here, were you confronted with any of these items back at the scene --
A. No, sir.
Q. -- that were introduced?
A. No, sir.
Q. Were you asked back at your home or at the scene about any of these other items, specifically the black canvas bag, the silencer, the MAC-11, the MAC-11 cartridges, all that stuff, were you asked about any of that by any of the officers there?
A. No, sir. No, sir, I was not.

Q. You heard Officer Mashnouk testify that he found a black canvas bag behind the bench seat in your pickup truck.
A. Yes, I did.
Q. He testified that there was this black canvas bag there [Tr. 299] containing a bunch of items.
A. Yes, sir.
Q. Did you then have any knowledge of that black canvas bag containing all those items?
A. Absolutely not.
Q. Were they yours?
A. Absolutely not.
Q. Did you have any idea they were back there?
A. No, sir, I did not.
Q. When was the first time ever you saw all those automatic weapons?
A. I was arrested about 12:26, I believe is on the ticket. They said nothing to me at all until a quarter after 3:00 in the morning.
Q. And where was that?
A. That was at a substation in Weston.
Q. And you were brought there?
A. Yes, sir.
Q. Is that when you first met Agent Armstrong?
A. Yes.
Q. What about Agent Kilmer?
A. Yes.
Q. And Bob Faulkner?
A. Yes.
Q. That's Detective Faulkner, right?
[Tr. 300] A. Sergeant.
Q. Sergeant? Okay.
You were questioned, correct?
A. Yes, sir.
Q. By all three of those individuals, right?
A. Yes, sir.

Q. And did you agree to speak with them? Just answer the question.
A. Yes, I did.
Q. Did you want the discussion to be taped?
A. Yes, I did.
Q. Why is that?
A. Because it was taped before that.
Q. The statement that was played here today or yesterday, I guess it was, did that accurately reflect the discussions you had at that time with the exception of the redacted part, putting that aside, what was played was that accurate?
A. It was accurate to what was said on the tape but it wasn't accurate to what was said off the tape.
Q. Okay. What else was said?
A. Oh --
Q. How long did you speak with the agents?
A. A long time. I was there they claim it was 3:00 o'clock. It seemed like it was much longer than that. But they asked me many questions about my vehicle which the depositions will [Tr. 301] verify. They asked me -- they told me I wasn't in any trouble whatsoever. I told them I know nothing about this. I had collected guns from the time I was a young man in Kentucky.
Q. I wanted to ask you about that. Are you a gun enthusiast?
A. Yes, I am.
Q. Do you have any experience or training with guns?
A. Yes, I do.
Q. Could you please detail that?
A. This weapon --
Q. Just tell me about your experience.
A. I shoot competition .45. I shoot the Bianchi cup. I shoot plates this big around, six inches, and it's a skill. You have to have the safety on and it's timed. You do it at ten, twenty, thirty and forty yards. If you do not drop the safety when the weapon is pointed downrange you are disqualified. You become

one with the weapon. The weapons are very expensive. They actually shoot and hit much better than the human being can do it.

As my friend testified, I like cowboy guns. I had two or three complete sets but I had to sell them when I got sick and most of my collection -- well all of my collection now is gone.
Q. Have you ever owned any automatic weapons?
A. Absolutely not.
[Tr. 302] Q. Ever owned any silencers?
A. Absolutely not.

Well I don't know what training these people have but they trained us in Vietnam that if we need to silence a weapon use an oil filter or use a 2-liter coke bottle with towels wrapped in it. And at one point we did use silencers in Vietnam.
Q. I should have distinguished it between here and in Vietnam.
A. Yes. Absolutely not.
Q. In this country?
A. Absolutely not. It's against the law. I sold guns back in the early '70's. That was one of the rules and regulations that was read to me by the owner of the shop. They weren't even allowed in our shop. Absolutely not.
Q. What shop was that?
A. The Bob X Sporting Goods Shop. A very serious charge.
Q. Did you give the police permission to search your house?
A. Yes, I did, sir.
Q. Now, when you were brought to the substation tell me what happened. Let me withdraw that and ask you this: Were you brought into a room and did you observe some of these items?
A. Yes, sir, I was brought up a ramp and they opened the door and the table was about as long as two of those put [Tr. 303] together and --
Q. Where were you seated?

A. I was seated at the end of it and Mr. Dale Armstrong was seated to my right and Mr. Joe Kilmer to my left and the weapons were in front of me and that is the first time they said it.
Q. Said what?
A. That that was found in my truck.
Q. What was your reaction to that?
A. I couldn't believe it. I asked them why they hadn't told me at my house or why the officers, every one of them passed by my house. Dale Armstrong passed by my house, the DEA agent, the Organized Crime. I guess they thought I was some kind of a gunrunner or something. Why didn't they stop then? Why didn't they fingerprint the items?
Q. We'll get to all of that.

Let me show you what's been previously marked Government's Exhibit No. 1 and ask you to take a good close look at that inside and out.
A. This is not my bag.
Q. Sure?
A. I am absolutely sure. My bag had tools in it and I have a bass fishing boat and I kept the tools in the bag from the truck to the boat and it had rust in the bottom of it. This bag has no rust in the bottom of it. I do not know where this [Tr. 304] bag came from. It does not belong to me.
Q. When is the first time you saw that bag?
A. I seen that bag -- That night I seen it but I had my glasses off.
Q. Where was the bag?
A. It was sitting about from here, farther than that chair. It was sitting clear at the other end. It wasn't up with this stuff. It was sitting back farther.
Q. During the conversation with the agents did you tell them that that was your bag?
A. I did. I thought that that was my bag.
Q. Did you have a black canvas bag?

A. Yes, I did, but it was not like this.
Q. Well, was it similar, was it black and canvas?
A. It was similar to this but it didn't have the pockets on the side.
Q. All during your conversations with the agents you thought that was your bag and identified it as so, correct?
A. Yes, sir.
Q. When is the first time that you realized that that bag did not belong to you?
A. When they brought it into my state trial.
Q. And how long ago was that?
A. 1992. And I said to you the minute I seen it I said to you, "That is not my bag."
[Tr. 305] Q. Mr. Rogers, let me ask you about Government's Exhibit No. 11 which is a plastic bag, if you will, of some bullets.

MR. SALANTRIE: May I approach, Your Honor?

THE COURT: Yes, sir.

MR. SALANTRIE: Thank you.

BY MR. SALANTRIE:
Q. Was that ever displayed to you?
A. Yes, that was on the table.
Q. Were there bullets in the bag?
A. Yes, there was.
Q. At some point in time in the conversation with Dale Armstrong, Agent Armstrong, you were asked, "Do you recognize these bullets?" You said, "Yeah, they're mine."
A. Yes, sir, I did.
Q. How were these displayed to you at that time?
A. Sergeant -- pardon me -- Deputy Bushnell, the arresting officer, had them in a red handkerchief along with my wallet, my pocket knife. He goes over and takes them out. There was thirteen bullets, they are Hydra Shok bullets and he lays them

down right in the middle of the table. And that's when I said, "Those are my bullets."
Q. And where did they come from?
A. Out of those two magazines.
Q. Talking about the .380 magazines?
A. Yes, sir.
[Tr. 306] Q. One of which was in your pocket and one of which was in the gun?
A. Yes, sir.
Q. Did you ever identify that plastic bag as being yours?
A. No, sir, I did not identify that plastic bag.
Q. Had you ever seen that plastic bag before that night?
A. No, not before that night, I didn't.
Q. The first time was at the conference table?
A. Yes, sir.
Q. You appeared, to say the least, very upset and crying at some portions during that interview. Is that right?
A. Absolutely. This is a very serious charge. I mean, it's affected my whole life already. It's a very -- the U.S. government is hard to combat when you're poor and it's very difficult.
Q. Were you handcuffed during this interview?
A. Yes, sir, I was.
Q. Where, how?
A. Behind my back.
Q. Did that have any effect on you, on your hands, your arms?
A. Yes, my hands were swollen very badly.
Q. Did you have your glasses on?
A. No, sir. They wouldn't give me my glasses or my watch. They took it off. I don't know why they did that.
[Tr. 307] Q. Do you know who took the glasses?
A. Sergeant Bushnell had them.
Q. Or Bushong?
A. It's Bushong? Okay, I'm sorry.

Q. Was there a discussion that you had with the agents, Agent Armstrong in fact, regarding fingerprinting the items that you denied knowledge of?
A. Absolutely.
Q. Tell us about that.
A. He asked me first if they fingerprinted that would my prints be on there and I said no. And he said, "None?" And I said, "Absolutely not."
Q. Would they be on there?
A. Absolutely not.
Q. Did you ask the Agent Armstrong --
A. That was one of the last things I asked him.
Q. What did he tell you?
A. He said that they would.
Q. Do you have any physical impairments now, injuries, illnesses?
A. Yes, my ankle. I have jungle fungus in my lungs.
Q. Which is what, agent orange?
A. It's a fungus that is caused by being out in the jungle and about one of three hundred fifty thousand G.I.s that was in Vietnam got it. There's no known cure. The only thing --
[Tr. 308] MR. BARDFELD: I object, Your Honor. This is irrelevant.
BY MR. SALANTRIE:
Q. You don't have to go any further.
THE COURT: Very well.
BY MR. SALANTRIE:
Q. Anything else?
A. Yes. I have a heart problem now.
Q. You mentioned in your statement prostate cancer.
A. They thought I did.
Q. You don't?
A. No, they gave me medication and that has gone away.
Q. Mr. Rogers, Government's Exhibit No. 5, do you know what this is?

A. This is a silencer, yes. I know exactly.
Q. You are familiar with it?
A. Yes.
Q. Is this yours?
A. Absolutely not.
Q. Had you ever seen it before that time on the table?
A. Absolutely not.
Q. Do you know how it got in your car?
A. Absolutely not. I do know that my tools have never been recovered.
Q. Mr. Rogers, showing you Government's Exhibit No. 2, do [Tr. 309] you know what this is?
A. Yes. It's a .380 Ingram and it was manufactured first for the police departments and then when war broke out they introduced it into the military. I personally have never had one in my hand.
Q. Is this yours?
A. Absolutely not.
Q. Did you have any knowledge of its existence in your pickup truck?
A. Absolutely not.
Q. When was the first time you saw this item?
A. When Mr. Dale Armstrong picked it up and said, "Do you know what this is?"
Q. You did know what it was.
A. Yes, I know weapons.
Q. Did you deny knowledge?
A. Did I deny that it was mine?
Q. Right.
A. Absolutely.
Q. Did you tell them you didn't know anything about it?
A. I do not know how it got in my pickup truck, no.
Q. This particular exhibit here is wrapped with some sort of leather.
A. Yes, I see that.

Q. Did you do that?
[Tr. 310] A. Absolutely not. That is the most dangerous thing you can do.
Q. What about the rest of this stuff that was in the black bag?
A. Absolutely not.
Q. Have you ever seen this catcher before?
A. No, I did not ever see that before.
Q. Have you ever touched any of these items?
A. Absolutely not.
Q. With the exception of these over here which you admit.
A. Those are mine. Those belong to me.
MR. SALANTRIE: I have no further questions.

* * * *

CROSS-EXAMINATION OF GEORGE ROGERS

[Tr. 312] BY MR. BARDFELD:
Q. Mr. Rogers, on direct examination you were asked a number of questions about the interview that occurred; do you remember that interview?
A. Yes, sir, I do.
Q. And you listened to the tape that was introduced into evidence, did you not?
A. Yes, sir, I did.
Q. And except for the redactions that was accurate?
A. Yes, sir, it was.
Q. Didn't you say on the tape that you no longer drink or you don't drink?
A. I don't drink alcohol. I will have a beer occasionally.
Q. On direct examination you were asked the question where you were coming from and you said you stopped in a bar to shoot pool or something like that. You stayed in there for only five minutes, didn't you say that?

A No, sir. I thought they were having a pool tournament because it's not like that place to have that many patrons on [Tr. 313] a Thursday night. I turned around and came back because I'm a pool enthusiast but they were not having and I only stayed maybe five minutes.

Q. And while you were in there you just stayed and looked around and said this isn't your crowd?

A. No. The bartender recognized me and he set a beer up and I said, " I'm broke. I just spent my last ten dollars on a pizza," and he said, "Well, catch me some other time."

Q. But you drank a couple of beers that night, didn't you?

A. I drank three beers, yes, sir, I did, with a pizza.

Q. In less than five minutes you drank those three beers?

A. Oh, no, sir. The police officers stopped by the tackle store -- well, they called me at quarter after 10:00 and asked me if I had eaten --

Q. Wait a minute. Police officers stopped by the store?

A. No, a police officer called the tackle store --

Q. Which police officer are you referring to?

A. It's a Hollywood police officer.

Q. You are referring to a friend of yours.

A. Yes.

Q. Okay.

A. He asked me if I had eaten and I said no and he said, "Well, order us a pizza." So the pizza store was two doors down. I went down, told them to fix us a large pizza. He came by, he bought the pizza, we both had three beers and [Tr. 314] large pizza.

Q. You also said that you'd been shot four times in Vietnam, is that right?

A. Yes, sir.

Q. But you only have one scar, isn't that correct?

A. No, sir.

Q. You have scars all over?

A. I have here, on my head, this knee and this ankle.

Q. You heard the interview, didn't you?

A. Yes, sir.

Q. On the taped interview they asked you about scars and you said you had one on your ankle, right?

A Yes. He asked me if I had any significant scars and I said, "On my ankle."

Q And you forgot about the other scars at that time?

A Yes, at that time. I was going through quite a bit at that time.

Q. You also heard the taped interview where Agent Armstrong asked you if this was your bag, isn't that correct?

A Yes, sir, I did.

Q. And you heard him testify, you were sitting there at counsel table when he was testifying?

A. Yes, sir.

Q. And when you were going through the tape do you remember at different portions of the tape I would have Agent Gomilla [Tr. 315] stop the tape and would ask exactly what exhibit he was referring to, isn't that right?

A Yes, sir.

Q And Dale Armstrong said at that time when referring to this bag, he said -- okay -- and you said the tool case was yours, right?

A. Yes, sir, I did.

Q. And he raised this and he said this is the tool case that you were talking about at that time, right?

A. Yes, sir, that's correct.

Q. So at that time you said this was the tool case.

A. That night I thought it was.

Q. Now you say it's not your tool case?

A. No, sir. I said that in the State court. The moment they introduced that in my State trial I told my attorney, I said, "That is not my case."

Q. What is the difference between this case and the one that you had?

A. The one that I had had no pockets on and was, I believe, slightly larger.
Q. Where is your case, do you know?
A. I asked them to check the truck and the tools and case have never shown up.
Q. You didn't have your glasses on during that interview, isn't that right?
[Tr. 316] A. I did not, no sir.
Q. Yet every time the agent would raise this you knew exactly what it was, isn't that right?
A Yes, sir. He was sitting about three feet from me.
Q. In fact, when Agent Armstrong asked you -- First he asked you if this was yours and you said no, right?
A. Yes, sir.
Q. But then he asked you what it was and you knew exactly what it was, didn't you?
A. Absolutely.
Q. And you knew this was a .380, didn't you?
A. Yes, sir.
Q. Isn't a .380 going to look exactly like a .45?
A. Oh, no, sir. That looks nothing like a .45.
MR. BARDFELD: One moment, please.
BY MR. BARDFELD:
Q. Isn't this going to look exactly like a 9 millimeter?
A. MAC --
Q. The only difference between the two?
A. No, the MAC-9 is much bigger than that.
Q. Do you know exactly what caliber weapon was fired from that, right?
A. Sure.
Q. A .380?
A. Sure. I've gone to many, many weapons shows and I know [Tr. 317] the weapons.
Q. And you also know exactly what this is the moment --
A. I've used those silencers in Vietnam, yes, sir.

Q. The moment Agent Armstrong showed it to you during your interview you said, "Oh, I know exactly what this is."
A. Absolutely.
Q. Yet you claim you've never seen any of these before.
A. No, sir, I've not.
Q. These are your bullets?
A. No, sir, they are not.
Q. You did have .380 caliber bullets in your car, did you not?
A. I had thirteen .380 Hydra Shok.
Q. .380 ammunition is the same ammunition that goes in this machinegun, does it not?
A. Yes, sir, it is.
Q. When asked during the interview you also knew exactly what Government's Exhibit No. 10 was, did you not?
A. Yes, sir.
Q. The bafflings?
A. Yes, sir. I could have bought those at the show three weeks ago.
Q. But you knew exactly what they were the moment they were shown to you?
A. Absolutely, sir. When you depend your life on silencers [Tr. 318] you know how to take them apart and work on them, you know their elements.
Q. You deny knowledge of the existence of any of this, the bag, the silencer, the machinegun, is that right?
A. I didn't hear all the question, sir.
Q. You deny knowledge of any of this?
A. Yes, sir, that does not belong to me and it has never at any time belonged to me.
Q. Would it be fair to say that you believe that you were set up in this case?
A. Sir, I am not -- I do not know what happened. My hand to God, I do not know what happened. I do not know how that

got in my truck and I do not know what happened. I only know that it is not mine.

Q. Even though you originally said that this bag was yours?

A. That night, sir, I thought it was mine. It was setting from about where I am to my attorney.

Q. But you had no problems identifying anything else, isn't that right? I mean, wasn't everything else the same distance away?

A. No, sir.

Mr. Armstrong was hands-length away and he would pick it up and he would hold it and he would say, "Do you know what this is?"

Q Oh, but everything else except for this particular bag he [Tr. 319] held up, right?

A. Yes, sir.

Q. So you are saying that the reason you were unable to determine that this was not your bag was it was far away while everything else was close.

A. Yes, sir.

Q. That's what you're saying?

A. Yes, sir, it was. It was on a filing cabinet above the two arresting officers that were doing their paperwork.

MR. BARDFELD: May I approach, Your Honor?

THE COURT: Yes, sir.

BY MR. BARDFELD:

Q. All of the weapons were on the table but the bag was on a filing cabinet --

A. Yes, sir.

Q. -- a long way away?

I show you what has been marked as Government's Exhibit No. 16 for identification. Take a look at that picture.

A. Yes, sir.

Q. That's the same bag that you said was yours, isn't that right?

A. Yes, sir.

Q. That bag in that picture is on the table with the rest of the weapons, with these weapons, isn't that right?

A. Yes, but this is not how it was laid out when I was [Tr. 320] there.

Q. That was done afterwards or beforehand?

A. It had to be because this wasn't the way it was laid out when I walked in.

Q. So all of the items that Agent Armstrong was showing you were on the table except for this.

A. Yes, sir.

Q. And the reason this was a long distance away that's why you didn't know it was yours, is that right?

A Yes, sir. That's correct.

Q. But everything else was on the table?

MR. SALANTRIE: Objection: asked and answered.

THE COURT: Sustained.

MR. BARDFELD: I have no further questions.

THE COURT: Very well. Redirect.

MR. SALANTRIE: No, sir.

THE COURT: Thank you, very much. You may step down, Mr. Rogers.

THE WITNESS: Thank you, Your Honor.

* * * *

CHARGE CONFERENCE

[Tr. 324] THE COURT: Let's begin with the charge conference in the U.S. vs. Rogers case.

Each of you have received a copy of the charge pack before lunch and I take it you had a chance to go over them; if you haven't, why, please speak up for the record.

Does the Government have any objections or suggestions as to the Court's proposed charge pack.

MR. BARDFELD: No, Your Honor.

THE COURT: Does the defendant have any objections or suggestions to the Court's proposed charge pack?

MR. SALANTRIE: Yes, Your Honor, I do.

THE COURT: Okay.

MR. SALANTRIE: Initially I have submitted three special instructions, requested ---

THE COURT: I know, but I think they're adequately covered.

MR. SALANTRIE: So they're denied then?

THE COURT: They're all denied.

MR. SALANTRIE: Okay.

My objections are as follows and\or suggestions are as follows: Page 9 essentially defines Count II, the essential elements and I believe that there should be a third essential element in there, that being knowledge or knowing. [Tr. 325] It exists in Count I on the previous page as a third element: "Such possession must be knowing." It exists in Count III in the first element on Page 10, "that the defendant at the time and place charged in the indictment knowingly possessed."

THE COURT: That's right. If you'll read the last paragraph you'll understand why it's not there.

MR. SALANTRIE: I've read that and I understand that; however I don't think it should be No. 3 so it's very clear to the jury that there's three elements. If that's the third element as it is in fact, it should be listed as third and that the possession was knowing or knowingly. It is listed in the indictment knowingly.

THE COURT: It also is listed there in the last sentence, "it must be proved beyond a reasonable doubt that the defendant knowingly possessed the item as charged," and such item was a firearm and --

MR. SALANTRIE: Judge, I understand it's there.

THE COURT: You want me to insert knowingly between defendant and possessed in the first element, I don't care.

MR. SALANTRIE: Sure. That would work.

THE COURT: Okay.

Knowingly, of course, is set forth in a separate instruction later on right after possession.

MR. SALANTRIE: Yes. I have an objection to that also, no.

[Tr. 326] My other objection is on Page 11, on the third paragraph which states -- which is basically a constructive possession definition and states:

> "Who has both the power and intention to later take control over something, either alone or together with someone else, is in constructive possession of it."

I think that is not an accurate statement of the law notwithstanding the fact that it's in the pattern instruction.

THE COURT: Forever.

MR. SALANTRIE: I'm sorry?

THE COURT: Forever. It was a pattern and approved by the Fifth Circuit back in the '70's when I first came on this court.

MR. SALANTRIE: Judge, I have a 1989 Fifth Circuit case that says it's not and if I can just address that.

THE COURT: Well I haven't been reading 1989 Fifth Circuit cases lately ever since we split off from them unless it's called to my attention.

I will admit there is another pattern instruction from either the Seventh -- I think it's the Seventh or Sixth or the Eighth somewhere in the heartland that I like better than this Fifth/Eleventh one.

MR. SALANTRIE: This is a Sixth Circuit case I previously cited and provided to the Court, United States vs. [Tr. 327] Daniels.

THE COURT: I don't think so. I would know it if I saw it, I think.

[MR. SALANTRIE]: This may not be the case but this does -- this is a '75 case actually where it states,

> "Constructive possession exists when a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control over the object."

My only request and only objection is that one of the elements has to be that he knowingly has both the knowledge and the power and intention to later take control over something. It's implicit but it's not stated.

THE COURT: But it's certainly implicit.

Well, I don't want to be the one to have the case where the Eleventh Circuit finally changes it's mind on it, but I'm not sure they ever will and what I normally do, frankly, is give their possession instruction, the pattern one, and then if it looks as if a jury is hung up and starts asking questions on me then I try to give an alternative definition --

MR. SALANTRIE: Judge, my --

THE COURT: I can't do that -- I don't want to do that at the beginning.

[Tr. 328] MR. SALANTRIE: Might I cite another case?

THE COURT: There's no reason to assume the jury can't figure this out from this pattern instruction whether or not it applies to this case.

I'm willing also to state on the record very candidly that I talk with my jurors after the trials are over and ask them about things like this and they clearly don't understand constructive possession as well as they do actual, but I think that is understandable.

MR. SALANTRIE: May I cite --

THE COURT: You just don't find juries holding defendants guilty of possession with intent to distribute very often -- occasionally, not very often unless the defendant touches it or has it in his house under his bed, in his car, some place where he clearly has control, dominion and intention to take control of it later.

MR. SALANTRIE: If I may cite another case. U.S. vs. Hastings, cited at 918 F2d 369, it's a Second Circuit case but it's a 1990 case which is directly on point and it states, and I can provide the Court with this copy, I don't have an extra one here:

> "Instruction that a defendant could be found guilty of unlawful possession of a firearm if he had the power or intention to control a firearm did not adequately [Tr. 329] incorporate knowledge as an element of possession even though court subsequently stated that the defendant must have voluntarily possessed the firearm."

It's stating that power, intention and voluntariness are not enough terms to relate to the jury that knowledge is an essential element. This was reversed and remanded. I have read through this case in detail and it --

THE COURT: What's the cite on it?

MR. SALANTRIE: The cite?

THE COURT: Yes.

MR. SALANTRIE: Is 918 F2d 369. This was a gun-in-the-car case. It's a short opinion.

THE COURT: I like that pattern better than the one we got, I tell you that.

MR. SALANTRIE: I do also, Your Honor. I think it can be easily modified by just putting in that one statement, "which he has knowledge of" and it's cured.

> "A person who is not in actual possession but who has both the power and intention to later take control over something which he has knowledge of

> either alone or together with someone else is in constructive possession of it."

It flows, I think it reflects the law and certainly it is our [Tr. 330] defense that there was no knowledge.

THE COURT: Well, it's kind of awkward. I don't mean to be quibbling about words but:

> "A person who is not in actual possession but also has both the power and the intention to later take control over something of which he has knowledge,"

set off --

MR. SALANTRIE: That's fine.

THE COURT: -- in a positive, "either alone or together with someone else." I think it is accurate. It is awkward a little bit. True, somebody could do a better job of drafting it if we took the time.

I don't have any problem doing that --

MR. SALANTRIE: Okay.

THE COURT: -- "over some things, which he has knowledge. . ."

MR. SALANTRIE: That's all I'm asking.

MR. BARDFELD: Your Honor, I would object. I would just say that the Eleventh Circuit pattern instructions clearly incorporate what is necessary in order to prove the elements of this particular crime. This is a Second Circuit case. Until the Eleventh Circuit comes, I think we can go ahead --

THE COURT: I know that but this isn't the first [Tr. 331] case and time I have expressed this opinion. I've been troubled by our pattern possession instruction for ages largely due to answers and questions I get from jurors when I talk about it with them after the trial is over. And occasionally you can see it in questions they ask.

MR. BARDFELD: Your Honor, if they were to ask questions while deliberating this case, if they had any questions about it we could do it at that time; but until that comes up I think we can use the pattern instruction.

MR. SALANTRIE: They may not ask the question.

THE COURT: If the Government has proved beyond a reasonable doubt that he knew the machineguns were there I think the jury will return a verdict of guilty and if the Government hasn't proved beyond a reasonable doubt that he knew those things were there even though he denies knowing how they got there I think they will find him not guilty; but it is the big issue in the case as far as I can tell.

MR. BARDFELD: Yes, Your Honor.

MR. SALANTRIE: Yes, sir, the only issue really.

THE COURT: I'm going to put a comma after "something," in that middle paragraph, "of which he has knowledge."

Anything else?

MR. SALANTRIE: Yes, sir.

THE COURT: The charge conference is going to be [Tr. 332] longer than your closing argument.

MR. SALANTRIE: Page 12, Judge. Again, I'm adjusting the word "knowingly." I don't think that adequately explains the common meaning of knowingly. Everyone -- it doesn't say anything about knowingly being aware or conscious of. I submitted a proposed jury instruction to that effect and I would just ask that the words, "awareness" or "consciousness" or something to convey to the jury that knowingly means you have to know it's there, the common meaning, the Webster's definition.

THE COURT: I think it is quite clear. Your objection is overruled.

Actually your defense is that it was a mistake or an accident if you want to characterize it that way.

MR. SALANTRIE: Lastly on Page 9, the bottom paragraph where it states,

> "It is not necessary for the government to prove that the defendant knew that the item described in the indictment was a firearm which the law requires to be registered."

I think that is a misstatement of the law.

I would point to United States vs. Anderson, 885 F2d 1248, Fifth Circuit, 1989 some of which states:

> "To be convicted of possession of an [Tr. 333] unregistered firearm under National Firearms Act the government is required to prove that the defendant knew that items in question were 'firearms under Act' not that items in question were 'firearms within general meaning of the term,'"

as well as doubles overruling the United States vs. Vasquez, which also is a Fifth Circuit case.

I think some of the other case law consistent with this instruction, pattern instruction, is relying upon U.S. --

THE COURT: I think this one gets into that --

I think it is ambiguous under the Supreme Court where they cite their new brother associate's opinion in his former bench in the Eighth Circuit, Blackmun, where it was confusing as to whether it's a firearm within the meaning of the statute, at least that's the way I remember it. It's been a long time since I looked at that case; not a firearm in the general sense of a shotgun, rifle, something that will expel a projectile.

The Anderson case was an en banc opinion 827 --

MR. SALANTRIE: Yes, sir.

THE COURT: -- reversing their prior precedent.

MR. SALANTRIE: Exactly. So they evidently thought about it long and hard and reversed themselves.

THE COURT: Maybe the reason they thought about it [Tr. 334] so long and hard is because they had a prior precedent to the contrary. I haven't read the dissent yet and probably won't.

I mean Judge Gee wrote the opinion on the majority. Pat Higgenbottom was on the majority; they are not flaming liberals or bleeding hearts.

The only problem with the Anderson case, the majority was concerned and I think legitimately so where the factual situation where somebody can inherit a weapon or simply by wear and tear, as they say, it can change from semi-automatic to automatic and suddenly this person can be charged as a dangerous felon and yet there is no outward appearance that would indicate it is an automatic weapon rather than a semi-automatic.

And anybody in ATF or that sits in federal court that hears very many of these cases know you can change many semi-automatics into automatics by simply filing off the sear. I think you can convert an M-1 into an M-2 that way, make it fully automatic. And there are kits out whereby you can do that. That's no problem. Somebody buys a kit and makes it an automatic, clearly he has knowledge; but the reasonable wear and tear is another item, although I don't think that's the kind of case we are talking about here.

Even Raven MAC, down here made a firearm or weapon not very long ago which everybody knew who was in on the know apparently but reasonable wear and tear would quickly convert [Tr. 335] that -- where the control that kept it from becoming automatic and that it would be just, no pun intended, automatically become an automatic, fully automatic. And Judge Gee has gone into that twice now in this opinion. He doesn't usually say things more than once. To be sure what defendant seeks here would prevent against that situation.

I was just looking at the dissenting opinion, find out there is only one opinion in the dissent. It starts off and

stays with the argument pretty much anyway, at least it starts off with the problem of stare decisis and their interpretation of the Freed opinion in the Supreme Court.

MR. SALANTRIE: Which I have cited previously. Apparently two different interpretations of that.

I think the bottom line in this case is on Page 1255, if I might, Your Honor, on the right-hand side which states:

> "We overrule Vasquez" -- bottom there -- "under which innocent possession of a worn or altered autoloader can result in jail time. Such rule is unjust and dangerous and there is little if any need for it, for in most cases as in this one Mens Re will be provable if it exists."

This is a case where we have an altered semi-automatic weapon and it would require the expertise of the [Tr. 336] gentleman from ATF in Washington to come down and explain how and why wrapping shoe leather or a shoestring around the trigger safety in conjunction with internal modifications render that firearm automatic whereas it was manufactured as a semi-automatic and a totally legal weapon.

THE COURT: Well Vasquez is binding on this Court.

MR. SALANTRIE: It was overruled, though, by Anderson.

THE COURT: In the Fifth Circuit but at the time of 1981 we took the Fifth Circuit controlling law as the controlling law of the Eleventh Circuit and until the Eleventh Circuit goes the way the majority did and whose to say they would because the facts are different. Even in their statement about we overrule Judge Gee comes back to this thing he has been harping on about possession of a worn or altered autoloader.

Yours is on Count II.

MR. SALANTRIE: Yes, sir.

THE COURT: If you'll just read the last sentence you're adequately protected, sir.

MR. SALANTRIE: It seems the first sentence and the second sentence are mutually exclusive. One says it's not required for him to have knowledge that it's a firearm. The second says it is. It has firearm in quotes.

> "It is not necessary for the government to [Tr. 337] prove that the defendant knew that the item described in the indictment was a firearm which the law requires to be registered."

Not required.

> "What must be proved is that he knowingly possessed the items charged as such --"

THE COURT: Your client has gotten on the stand and testified that he knew instantly that that silencer was a silencer and a firearm and it was bad and he shouldn't have it. We could take that sentence out of there.

MR. SALANTRIE: He didn't say he knew it should be registered.

THE COURT: The way I remember his testimony that's the way it came out.

MR. SALANTRIE: He said he knew it was a silencer and that they're bad, yes, sir, he certainly said that; but there was no query regarding whether he had actual -- whether he had knowledge --

THE COURT: Anybody knows as much about weapons as he has demonstrated, you know.

MR. SALANTRIE: Certainly, Judge, that argument can be made.

THE COURT: That why he was --

MR. SALANTRIE: It seems like that first sentence [Tr. 338] and second sentence are contradictory.

THE COURT: Objection is overruled.

MR. SALANTRIE: That is all I have, Judge.

THE COURT: Very well. End of the charge conference.

* * * *

CLOSING ARGUMENT OF DEFENDANT

[Tr. 365] Members of the jury:

This will be my only opportunity to address you this [Tr. 366] afternoon. Unfortunately for me the government has the rebuttal, sometimes called the hammer, and he will have an opportunity to rebut or comment on anything I say to you at this point. I will not have such an opportunity. I just ask you to keep in mind and consider what I have said as well as the evidence as well as anything I might have said to rebut his remarks.

At this time also I would like to thank you for your time, thank you on behalf of myself as well as George Rogers for your time, your patience and your consideration in this case.

At the conclusion of the arguments, actually tomorrow, His Honor, Judge Roettger, will read the instructions or, in other words, the law of the case, and it's the only law that applies here, and I will discuss a couple of those with you in a moment. Thereafter you will begin your deliberations and sit in judgment of George Rogers who is accused in a three count indictment as you are aware, who has pled not guilty to these charges, who has emphatically and adamantly and repeatedly and consistently denied possession or knowledge of those items.

Now, I want to touch upon, very briefly, a couple of the legal principles and I don't want to bore you with it, you heard it before, but I just feel duty-bound and obligated to mention it to you because it is the whole crux of [Tr. 367] our judicial system, criminal judicial system.

As you know and are aware, Mr. Rogers, like me, you, anybody in this country, is presumed innocent of any allegations, certainly is at this point, and that the burden is strictly and exclusively on the government to prove guilt of the elements which we will discuss beyond and to the exclusion of a reasonable doubt.

Mr. Rogers does not have to prove his innocence to you, it is not required. No one accused is required to do that. And, lastly, the standard of proof in a criminal case, as you are aware, is much different, much higher, than a civil case, it's proof beyond and to the exclusion of a reasonable doubt. And that doesn't mean you think so, possibly is, could be, might be, looks like it, I have a suspicion that, it's a strong suspicion, clear and convincing evidence. None of that is good enough.

I ask you to look to the evidence, look to the conflicts in the evidence, look to the lack of evidence to determine whether or not there is a reasonable doubt as to the allegations in this case.

Now, the Court will read you an instruction on reasonable doubt, I believe it did already, and he will advise you, and I'm not going to read the whole thing, that:

> "Proof beyond a reasonable doubt is a very heavy burden and that the proof must be of [Tr. 368] such a convincing nature that you would be willing to rely and act upon it without hesitation in the most important of your own affairs."

You should keep that in mind.

> "The right of the people to keep and bear arms shall not be infringed."

Perhaps you've heard that. So says Article II to the United States Constitution which was ratified in 1791.

We have citizens, all of us have a right, many of you do, in fact, to own firearms. It's perfectly all right to own firearms. And, as Dale Armstrong testified, the vast majority

of all that stuff is perfectly legal. You can buy it in any gun show, you can have it in your house, business or whatever. So, please don't be overly influenced by some of these things over here, the Derringer, .380. They're perfectly legal. They're perfectly okay.

Obviously, there's two things at issue that we will talk about.

Now, before the government can sustain its burden of providing guilt in these three counts, they have to prove a number of things which His Honor will read to you only two of which are important from my standpoint and that I will discuss with you. They have to establish possession. And the government has to establish and prove beyond a reasonable [Tr. 369] doubt knowledge that he knew, in fact, and they have to prove knowledge beyond and to the conclusion of a reasonable doubt. That they have failed to do.

As you are aware, and I'm not going to go through it all, he denied it repeatedly. You have heard it, I don't need to say it any more, ownership, knowledge of this silencer, has no idea how it got there, as well as the MAC-11 sitting over here. He denied knowledge of that also. And that's what he's on trial for today, not that other stuff.

Now, the government seems to make a big deal about these bullets here and at first blush you think it is very important because they also happen to fit this .380 because they're both .380's. But, as Deputy Mashnouk candidly told you, he got them out of this other .380, got them out of this clip, got them out of the other MAC clip, one which was in Mr. Rogers' pocket, one which was in the firearm. He told you that, and he put them in the bandana which Mr. Rogers and only Mr. Rogers explained was put in front of him and he said, "They are my bullets." That's what he was talking about on the taped statement which you read and heard.

Deputy Mashnouk also said he found this plastic bag with some bullets, he had no idea, be it 35 or 36. There's

missing bullets here. Not so important, really. He found a plastic bag with some bullets in this bag.

Mr. Rogers has absolutely never admitted knowledge [Tr. 370] of this plastic bag or its contents which were inside the black canvas bag. What he admitted, you will recall, is those other .380's that were in the red handkerchief which he said, "They're mine, Hydra Shoks," which is a kind of .380. Don't get confused about that, please.

Now the Government saw fit to introduce evidence of a DUI; evidence of resisting without violence; carrying a concealed firearm, which is this Baretta; evidence of carrying a concealed firearm which is the .22. As you are aware now that was heard already before another jury and he was found not guilty of all those charges and that's it. No wrongdoing at all in relation to those other items. The jury has spoken already.

Now let's go to the read important issue here: Did he possess those two things or didn't he? And moreover, more importantly does the Government prove it to you? And secondly, did he have knowledge of those items, those two or not? And more importantly, did the Government prove he had knowledge beyond a reasonable doubt? And the last count has to go with registering this firearm, this silencer here.

First of all, Dale Armstrong said you can't register it because there's no serial number to register it. More importantly though, Mr. Rogers didn't register it because he didn't know about it. He had no knowledge of it, so how could he register it?

[Tr. 371] This certificate which you will get an opportunity to read certifies that a silencer, no serial number, was not registered. I don't know what that particularly proves. It doesn't prove that this one was not because there is no way to identify it.

It also mentions here a machinegun, this other one here, RPB, with the serial number on here which they do have

a series number, was not registered. The Government made no effort to trade that serial number on that particular weapon to see where it would go, who it would come back to. Maybe they can't do it because it wasn't registered, I quite frankly don't know, but no effort was made.

You will get a packet of instructions the Court has prepared. You will have an opportunity to read them as the Court reads them and take them with you and refer to them when you're in there. I want to mention a couple of them to you. Reasonable doubt on Page 3 I have already discussed. Page 8, 9 and 10 the Court will instruct you of the elements of all three counts. I'm not going to bother reading them to you. You can read them yourself. Also the Court will read it to you. But there is one very important element in there that is required on all three: Knowledge. Mr. Bardfeld didn't mention that in his opening remarks, just "It's in his truck, therefore he possessed it." That's not what the law says. The law says on each one that he either had knowledge or it [Tr. 372] was knowing.

Count I says such possession was knowing and Count II, it says knowingly, all the same thing. You know what the word means. And Count III also it says knowingly possessed. Obviously knowledge has to be proved beyond a reasonable doubt. Now they haven't proved that.

Now lastly, one other instruction is kind of important. It's the constructive possession, and that's on Page 11. You will get to read that also.

The Government has to prove possession. You may have an idea what possession means, it may be different to each and every one of you, but the law in this case will be read by the Court and this is what possession is for this case regardless of what you may think or not think. Basically you have to have actual possession or constructive possession. Actual is when it's right on you. Like I have actual possession of this pen. And you do your glasses back in your pocket. It's

right there, on your body or attached to you or where you can go just like this and touch it. The Government has not proved that, clearly. Deputy Mashnouk testified you can't see it. Even from the passenger compartment or outside the truck you can't see it, can't touch it. It's behind the seat, in the back, on the floor of the pickup truck. So the next issue is, does he have constructive possession because either one will work. What is constructive possession? A [Tr. 373] person -- I will read it to you -- A person who is not in actual possession, which we have here, but who has both the power and the intention to later take control over something, of which he had knowledge, either alone or together with someone else, is in constructive possession of it. So has the Government proved that to you? Once again, they have to prove knowledge, knowing.

Additionally, they didn't make any effort to prove that Mr. Rogers had any intention whatsoever to take control over it at some future date because obviously if he had no knowledge then he has no intention to do that.

Now I'd like to spend a couple of minutes commenting on some of the other things that Mr. Bardfeld mentioned in his closing.

They're making a big deal, I guess we all have to some extent, about this black canvas bag. First of all, possession of a black canvas bag is not illegal. Secondly, the Government wants you to draw some silly deduction that this little piece of leather here is somehow the same leather as this which it may not be. You can guess. The Government would like you to assume, of course it is. There of course has been no testimony, no expert to say, yes this is the same stuff, this came from the same roll, that it's the same diameter. Nothing. Zero. Don't have it. Government doesn't. So there's been no proof of that.

[Tr. 374] Now Mr. Rogers testified about the bag. He candidly admits and it is clear that he did say on the statement,

"That is my tool bag." He said tool bag with tools in it with rust in the bottom. None of that's there.

Now he has adamantly denied today that he's ever seen that bag prior to it being on the table. He says it was down at the end of the table or on the file cabinet. Dale Armstrong said it wasn't. Whatever. I don't know what to tell you. I wasn't there. But the bottom line is that he has told you that now, today, that after closely looking at that, after seeing at the state court, he says he saw it there. It's not introduced into evidence but a lot of things don't necessarily get introduced. That wasn't relevant in the state case, that's why it wasn't introduced.

Doesn't mean it wasn't there. He told you that he saw it then and he told me then and that's his testimony.

So what? He made a mistake. Can't he make a mistake? He didn't have his glasses on. He's handcuffed. He's crying. He's screaming. He made a mistake. Let's convict him because of that. How about Dale Armstrong and all of his mistakes? Remember those? He didn't know 1:30 from 3:00 o'clock in his own report. "I made a mistake." He didn't know if Mr. Rogers was there first or Armstrong was there first. That's pretty tough. He made another mistake. That doesn't mean you should totally disbelieve the guy. [Tr. 375] Everybody makes mistakes. George made a mistake. He thought it was his. He has testified that that's not it. Seeahray has testified, "That's not it. I've never seen it before. I gave him the bag. That's not it."

They make, Government makes a big deal about the fact that Mr. Rogers readily is able to identify and explain what all these items are. They want you to take a quantum leap then because of that assume that there is. Well that's not the case. Mr. Rogers testified that he has been around firearms since the '60's -- or since he was a child; that he used silencers unfortunately in Vietnam where he was wounded. So, sure, he knows what silencers are. Big deal. He knows what automatic

weapons are. He reads books. He's a gun enthusiast. He goes to gun shows. That's not illegal. So what? Yes, he knows what they are and he honestly said, "Yes, I know what they are," and expends what they are. That doesn't mean he knew about it, he had knowledge of it being in the back of his pickup truck. Don't jump to that conclusion like the Government wants you to do.

I don't know if I need to comment about this, you know he said he didn't drink and then he said he had a couple of beers. He testified that he doesn't drink hard liquor; he had a couple beers with a pizza. It's not a big deal. He doesn't drink hard liquor. Some people distinguish the two, some don't.

[Tr. 376] Now, if Mr. Rogers is going to concoct this lie about these items he could have done a hell of a lot better job. He could have said, I don't know what they are, never seen them before. He could have said, yeah, you know now that you mention it, Agent Armstrong, a lot of people had access to my truck. People down at the gun shop, people down at the rod shop, they go fishing. I lend my truck all the time. Heck, I just got it washed and I got it detailed. Had work done on it at the Chevy dealership last week. I mean he could have given all kinds of things but he said honestly, "No, I am the only one that has the keys." He's just being honest. That's not the most favorable answer for him but it's the truth.

A couple of other things. He readily gave them consent. He readily spoke to them and he wanted the tape recorder on. Good for him. Agent Armstrong never uses it. I tell you that he doesn't use it -- because he can get the three or four officers there, they can berate the witness or the defendant or the accused, come at him from eighteen different angles, confuse them, threaten them or do whatever they have to do to get the information they want, promise them something. It's pretty tough to do when the tape is on. Why not just tape everything? I don't understand. Because they --

Armstrong does not want you to know what happened. That's the bottom line. Why else not? But he did in this case. He [Tr. 377] didn't have a choice because George said, "Yeah, I'll talk to you on one condition: Get the tape." Miraculously a guy that never tapes anything has a tape recorder in a car that he always carried around with him. So it's taped. Thankfully it is because you get to hear him. You get to hear him crying. You get to hear how upset he is in there, how he's scared to death of these guys.

Couple of little things I want to just mention, not necessarily a big huge deal but how about -- and the Court will instruct you that you can look at any inconsistencies in testimony between these witnesses and the witness' own testimony to see if they're believable or not. You will also be instructed that you as the jury have the exclusive right to totally disregard any witness at all. You can accept all their testimony, part of their testimony or disregard it totally. That's up to you.

Now I'm not going to tell you to accept or disregard any, that's totally up to you. But I want to point out that you know Deputy Mashnouk with the strong odor of alcohol, glassy eyes, slurred speech -- what else did he say -- strong odor of alcohol. That's funny. Dale Armstrong, saw, observed and smelled none of that. He was in there for an hour and a half, side-by-side. Did you hear any slurred speech on that thing, on that tape? You'd think they'd be consistent. If you tell the truth it should be consistent. Even Dale [Tr. 378] Armstrong testified, "Oh, yeah, he had an odor of alcohol on his breath." Under oath, and of course I had to impeach him by pointing out that on a prior occasion under oath he had testified that there was no odor of alcohol. So then right before you he just retracted it. "Okay, I'm sorry. Never mind. I didn't say that."

Well I guess you're wondering when I'm going to get to this part? Where is the meat? Where is the beef? Where's the prints?

Agent Armstrong had the audacity to sit before you under oath and give you the BS reasons why they didn't make a little tiny effort to get fingerprints. I don't think I need to go through it in any graphic detail with you. You heard it all the first time on my cross-examination. You want to know really why? Because Dale Armstrong fashions himself to be both Prosecutor, Judge, Jury and Executioner. He's got his case. He's got proof positive. How many times did he say, "proof positive"? When I asked him, "If you got the fingerprints and they came back to George you'd have proof positive, wouldn't you?" And what did he say? "I would have additional proof positive." So he's just telling you as far as he's concerned, case closed. We don't need you. Don't need the jury to decide these issues. Dale Armstrong will do it for you. And since he's already made his decision, why bother take fingerprints? Because this guy is facing a lot of [Tr. 379] years, that's why.

The Government -- No fault of Mr. Bardfeld, incidentally. He wasn't the prosecutor at the time. He wasn't there investigating. I say, "the government," that's the government agent. Specifically Dale Armstrong as a government agent had the absolute opportunity to collect evidence in the form of fingerprints that if lifted and matched would have proved beyond a reasonable doubt, would have been proof positive that he had in his hands. You all heard fingerprint evidence is a hundred percent proof positive.

And he gave you all those ridiculous reasons why: labs too busy; didn't think I needed to. And then he had the audacity to say, "Well, it's too difficult."

Then on cross examination he finally admits, "Well, sure it's possible, just a little more difficult." And he talked about all the sophisticated methods available to the

government, to the FBI, the CIA, the ATF and everybody else. And it should be painfully clear to you that this government with all its resources certainly had the capability to try to take latent fingerprints off these items. Not only the MAC-11 but there's over a hundred bullets in there. There's this flash suppressor here. Hundreds of bullets.

Did you ever put a bullet in a gun? It does between your fingertips every single time, all one hundred of them. [Tr. 380] Nah.

I submit, ladies and gentlemen, in the face of such a vehement and adamant denial Agent Armstrong should have done a little bit more. He just disregarded what George said. Why? Because it's in his car, it's in the back seat, so he must know.

The government wants you to assume what they failed to prove to their own neglect. Don't do it. I ask you --

THE COURT: About four-five minutes.

MR. SALANTRIE: Thank you, Judge.

George even asked him, "Please take the prints. I promise you they won't be on there. You can do it right now."

The bullets are still in there. They had three years to do it. One lousy bullet. Or do a couple of them. Maybe it would match. Maybe they would get just one latent print, maybe two. Maybe it wouldn't match George, that he would have proof that he didn't touch it. The government also deprived Mr. Rogers of that opportunity. Maybe some print would come up. They have very sophisticated fingerprint comparison computers which you may or may not be aware of. You put the print in, they've got this computer thing and it comes back and makes a match. They could find out exactly who did possess all that stuff.

And lastly, ladies and gentlemen, you know they really deprive you as the trier of fact, you're charged with [Tr. 381] that responsibility, that very difficult responsibility trying

to figure out what the heck happened and whether they proved their case, whether there was knowledge, whether there was possession. I'm sure you would like to have known those fingerprint results, like to look at them, like to hear about it.

Ladies and gentlemen of the jury, I am going to close now. I'm not going to have an opportunity speak to you again. Thank you for your time, patience and consideration. I just ask you as difficult as it may be, not just assume stuff, don't just assume. If you want to assume anything assume what the law tells you to assume, that he's innocent. Don't take the quantum leap of just because it's in your car, or just because it's in your house. I mean, you would think so, true; but in the face of absolute vehement repeated denials the government has an obligation to do more. They'd didn't. They failed to do it. And I suggest as a result that you should have a reasonable doubt. You can either believe George's denials and in that case he's not guilty. Or you could say based on his denials or based on their evidence, I don't know, I'd like to have some more evidence, in which case you're not convinced beyond a reasonable doubt; and if that's the case I ask you to say so.

Thank you.

* * * *

JURY INSTRUCTIONS

[Tr. 392] Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions -- what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendant guilty of the crime charged in the indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, the Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove his innocence or produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find the Defendant not guilty.

[Tr. 393] Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As stated earlier you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and

interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your [Tr. 394] own decision concerning the facts.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that the Defendant is either guilty or not guilty. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I don't mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or don't believe any witness I suggest that you ask yourself a few questions: Did the person impress you as one who was telling the truth? Did [Tr. 395] the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the

witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses?

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that some other time the witness said or did something, or failed to say or do something, which was different from the testimony he or she gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and that may depend on whether it has to do with an important fact or with only an unimportant detail.

As stated before, a Defendant has a right not to testify. If a Defendant does testify, however, you should [Tr. 396] decide in the same way as that of any other witness whether you believe his testimony.

In this case, as you know, the indictment charges three separate offenses called "counts." I shall not read it to you at length because you will be given a copy of the indictment for study during your deliberations.

In summary, Count I charges that the Defendant knowingly possessed a machinegun. Count II charges that the Defendant knowingly possessed a firearm which was not registered to him in the National Firearms Registration and Transfer Record. Count III charges that the Defendant knowingly possessed a firearm, that is, a silencer, which did not have a serial number. I shall explain the law governing these offenses in a moment.

Next we come to the superseding indictment, it's copied for you. We're just going to scan through this.

The charge in Count I is that on or about March 15th, 1991, at Ft. Lauderdale, Broward County, in the Southern District of Florida, the defendant George G. Rogers did knowingly possess a machinegun, that is, a .380 caliber RPB Industries machinegun, serial number SAP3806432 in violation of Title 18, U.S. Code, Section 922(o).

Count II charges that on or about that same date and time and place, in this district, the Defendant, George C. Rogers, did knowingly possess a firearm, that is, a silencer, [Tr. 397] bearing no serial number, which firearm was not registered to him in the National Firearms Registration and Transfer Record as required by that chapter and title of the United States Code and other sections.

Count III charges that on or about the same date and place in this District the Defendant George G. Rogers did knowingly possess the silencer, which firearm was not identified by a serial number as required by the United States Code.

Now we come to the instructions on each count. Count I: Title 18, Section 922(o) makes it a federal crime or offense for any person to possess a machinegun.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: Defendant possessed a .380 caliber RPB Industries pistol, serial number SAP3806432, as charged in Count 1 of the indictment.

Second: This .380 caliber weapon was a machinegun as defined below; and

Third: Such possession was knowing. A machinegun, sometimes known as a "fully automatic weapon", means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single pull of the trigger.

[Tr. 398] Count II: Title 26, U.S. Code, Section 5861(d), makes it a Federal crime or offense for anyone to possess certain kinds of firearms which are not registered to them in the National Firearms Registration and Transfer Record.

Title 26, U.S. Code, Section 5845, defines "firearm" as including a silencer.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant knowingly possessed a "firearm," as defined above;

Second: That the "firearm" was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

It is not necessary for the Government to prove that the Defendant knew that the item described in the indictment was a "firearm" which the law requires to be registered.

Let me just stop here right now and, look up, folks. That doesn't mean the ordinary pistol, shotgun, rifle that anybody can buy. It's just the certain ones that -- It's confusing because we use that term "firearm" for that same thing that's so very lawful. It's just these certain things that are defined that have to be registered in the National Firearms Registration and Transfer Record.

What must be proved beyond a reasonable doubt is [Tr. 398] that the Defendant knowingly possessed the item as charged, that such item was a "firearm" as defined above, and that is was not then registered to the Defendant in the National Firearms Registration and Transfer Record.

Count III, possession of firearms having no serial number:

Title 26, U.S. Code, Section 5861(i) makes it a Federal crime or offense for anyone to possess a firearm having no serial number.

The term "firearm," as defined by Title 26, U.S. Code, Section 5845, includes a silencer.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant, at the time and place charged in the indictment, knowingly possessed a "firearm," as defined above;

Second: That the "firearm" had no serial number.

Third: That the Defendant knew that the firearm had no serial number.

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession.

A person who has direct physical control of something on or around his person is then in actual possession [Tr. 400] of it.

A person who is not in actual possession, but who has both the power and the intention to later take control over something, of which he had knowledge, either alone or together with someone else, is in constructive possession of it.

If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

Whenever the word "possession" has been used in these instructions it includes actual as well as constructive possession, and also sole as well as joint possession.

You will note that the indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government

proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may [Tr. 401] find the Defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any offenses charged.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted, the matter of punishment is for the Judge to determine.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs solely because the others think differently or merely to get the case over with.

[Tr. 402] Remember, that in a very real way you are judges -- judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreman or forewoman. That person will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience; and folks, you are going to have to look up at this point. Please look up. It is a blue letter-size piece of paper and it has the style of the case up here and it says "verdict" in capital letters here. In the body it says:

> "We, the jury find the Defendant, George G. Rogers, _____ as to Count I, _____ as to Count II, _____ as to Count III, as charged in the indictment; so say we all."

There's a place down here to date it and sign it.

You will take this verdict form with you into the jury room. When you have reached a unanimous verdict have your foreman or forewoman put your verdicts in these blanks, either guilty or not guilty, then you will return with your verdict to the courtroom.

If at any time -- Have your foreman or forewoman date it, sign it and then you can come back to the courtroom.

Ladies and gentlemen of the jury if, at any time, [Tr. 403] you need to send a message to the Court, there will be a court security officer outside your door at all times, he will be in a blue jacket and badge and he will bring the message to me and I shall respond as quickly as possible either in writing or by bringing you back into the courtroom where I can address you orally.

And remember you're not to tell your numerical difference to anybody, not even the Court until you have reached a unanimous verdict.

And with that I need to see the lawyers one more time, folks at the sidebar.

* * * *

ENTRY OF VERDICT

[Tr. 410] THE COURT: Neither lawyer has tried a case in front of me, I don't believe, since I've been following this practice I just engaged in. I discharged the jury and they are invited back to the jury room and it's a technique I borrowed from Judge Dowd in Cleveland. I tell them that -- - the example in baseball terminology of a runner at third base, one out, the batter hits a fly ball, the center fielder, left fielder, right fielder, whoever, as soon as the outfielder catches the ball, the runner tags up and runs for the plate and the outfielder throws the ball home or to a relay man as quickly as possible and the runner gets to the plate, he slides and the catcher catches the ball and makes the tag.

I tell them then, What does the umpire do? Signals out or safe. And he makes his decision right then while the evidence is freshest in his mind; and that they have done the same thing. They have made their decision while the evidence is freshest in their minds, and never gets any fresher. They did it as soon as all twelve of them could agree to it.

And then I remind them, What did the umpire do next? He turns his back and walks away. And I tell them that's what I want them to do because the evidence is not going to get any clearer to them tonight or tomorrow or the middle of the [Tr. 411] night. Maybe not on this jury, but I have had juries in the past where a little old lady would reach over and put her hand on my arm and say, "Thank you, Judge, for telling me that," because you can tell they're already starting to worry about it.

And I ask if they have any questions. They always have questions back there. They don't have any out here, but they always have them back there. They want to know about the sentencing process.

I think I can tell you this was an extremely sympathetic jury. One man told me after wiping away tears, that the jury all had a lot of compassion for the defendant and it was a difficult decision for them. There were a number of jurors in there, frankly, wiping away tears. I don't often see that. Obviously was a close question for them and because I think they felt he, I don't know if it was because of his war record or what happened in the war, or because of his unequivocal answers, but they did feel that compassion.

It doesn't change the verdict. Therefore, I must ask the Marshal to escort the defendant to the bar.

George G. Rogers, the jury having found you guilty of the crime charged in Count I, and guilty of the crime charged in Count II, and guilty of the crime charged in Count III, as charged in the indictment, the Court now adjudicated you guilty of the crimes charged in Count I, Count II, and [Tr. 412] Count III.

* * * *

EXCERPTS OF SENTENCING HEARING

[TR. 16] THE COURT: May I see the Probation Officer?

[Tr. 17] It is only about every five years or so you get a defendant takes the stand and testifies the way Mr. Rogers does, straight up, clear-cut, flat-out, no fudging or hedging, and it's always refreshing. I know the jury had trouble with their deliberations. Some of them were in tears when the verdict was published and they certainly were in tears when I went back to the jury room to talk to them like I always do when a guilty

verdict is returned. I don't ever remember any in my post-verdict discussion with jurors seeing that many of them in tears. Of course, I've only been doing it for a couple of years. Never leaves me with a satisfied feeling but it happens on occasion. It's happened here; and I think the jury was very conscientious despite their tears and that's because of the respect I think they felt for you. They still felt that, on the basis of the evidence, that the government had proved its charges beyond a reasonable doubt.

I don't think it makes any difference what way I rule on the outstanding objections, I'm going to impose a sentence of time served on the defendant, anyway. And I think it's significant because in the presentence report the Probation Officer points out that the defendant -- see if I can find it here. Paragraph 14:

> "Defendant is extremely distraught over his conviction and accompanying loss of civil rights."

[Tr. 18] I find that very significant because the mealy-mouth low lives that come before me for sentencing, they aren't concerned about the loss of their civil rights. The only thing they're concerned about is how much time they're going to get.

The defendant pretty well maxed out when he came in here for trial. He knew he wasn't going to get any more time or at least not very much more at the maximum, and he is concerned about his conviction and his loss of civil rights.

That speaks worlds for you, sir. I haven't said that very often at sentencing, once or twice, and they always seem to be in ATF cases. I don't know why. Maybe that's the nature of firearms. Maybe it's in the nature of people who have firearms. Maybe that's all the same thing.

Anyway, I have considered the statements of the parties and I have reviewed the presentence report. I am going to impose a sentence of time served in this matter.

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